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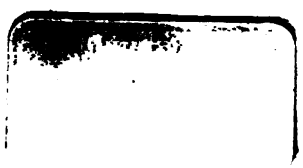

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REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS.

BY LUTHER S. CUSHING.

VOLUME I.

BOSTON:
LITTLE, BROWN, AND COMPANY.
1865.

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JUDGES

OF THE

SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS.

Hon. LEMUEL SHAW, Chief Justice.
Hon. SAMUEL S. WILDE,
Hon. CHARLES A. DEWEY,
Hon. CHARLES E. FORBES,
Hon. THERON METCALF,
} Justices.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

FOR THE

COUNTIES OF SUFFOLK AND NANTUCKET, MARCH TERM 1848, AT BOSTON.

PRESENT:

HON. LEMUEL SHAW, CHIEF JUSTICE.
HON. SAMUEL S. WILDE,
HON. CHARLES A. DEWEY,
HON. CHARLES E. FORBES,
HON. THERON METCALF,
} JUSTICES.

MEMORANDUM.

THE Hon. SAMUEL HUBBARD, who was appointed a Justice of this court on the twenty-second of February, 1842, died on the twenty-fourth of December, 1847.

On the seventh of February, 1848, the Hon. CHARLES E. FORBES, of Northampton, was appointed a Justice of this court, in the place of Mr. Justice HUBBARD, deceased, and took his seat upon the bench, on the third Tuesday of February, 1848, at the term of the court then held at Dedham, in the county of Norfolk.

The legislature, on the eleventh of February, 1848, passed an act, declaring that "the number of Justices of the Supreme Judicial Court shall be five," instead of four, as provided by the act of 1840, *c.* 87, § 6.

On the twenty-fifth of February, 1848, the Hon. THERON METCALF, of Boston, was appointed a Justice of this court, in pursuance of the act above mentioned, and took his seat upon the bench, on the first day of this term.

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COMMONWEALTH *vs.* HIRAM TUBBS.

In order to constitute a common seller of wine, &c., under the Rev. Sts. c. 47, § 1, it must be proved, that the defendant made three or more distinct sales of spiritous liquor: and it is not sufficient to prove merely that he had a place on his premises, fitted up in the usual manner with a bar for the sale of liquors, to be used on the premises; that the place so fitted up was provided with the liquors, or some of them, mentioned in the said section; that this place was provided with a person in the employment of the defendant, to wait upon customers; that the defendant, by himself or his agent, did, in fact, sell liquor, of some of the kinds mentioned, to be used upon his premises, to one person or more; and that the defendant, by himself or his agent, was there ready and willing to sell to persons who might come there to buy and drink; — though these facts are proper to be submitted to the jury, as evidence of three distinct sales, upon which they may find the defendant guilty as a common seller.

THIS was an indictment on the first section of the forty-seventh chapter of the revised statutes, against the defendant, charging him, on the first day of October, in the year eighteen hundred and forty-six, and on divers other days, between the said first day of October and the first Monday of November following, with being a common seller of wine, brandy, rum, and other spiritous liquors, &c.

On the trial, in the municipal court, it was proved that the defendant was the keeper of a public house, in Boston, known as the North American House; and evidence was also given, tending to show sales of spiritous liquor by the defendant, at different times, within the period mentioned in the indictment, to one Patterson, to one Webster, and to other persons not named.

The defendant's counsel requested the presiding judge to instruct the jury, that at least three distinct sales of one or more of the liquors, alleged in the indictment to have been sold by the defendant, must be proved to have been made by him, in order to render him punishable as a common seller; and that unless the evidence satisfied the jury, that such a number of sales had been made by the defendant, they should find him not guilty of the charge in the indictment. The presiding judge refused so to instruct the jury, but, on the other hand,

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did rule and instruct them, that if they were satisfied, from the evidence in the case, of three distinct specific acts of sale of spiritous liquor to be used on the defendant's premises, within the period mentioned in the indictment, which sales were made by the defendant or his agent, or that the defendant had a place on his premises, fitted up in the usual manner with a bar for the sale of liquors, to be used upon the premises; that this place, so fitted up, was provided with the liquors or some of them mentioned in the first section of the forty-seventh chapter of the revised statutes; that this place was provided with a person in the employment of the defendant to wait upon customers; that the defendant, by himself or his agent, did, in fact, sell any liquor of the kind mentioned to be used upon his premises, within the times mentioned in the indictment, including the first day therein mentioned, and excluding the last day, to one person or more; and that the defendant, by himself or his agent, was then ready and willing to sell to persons who might come there to buy and drink; this would be sufficient to constitute the defendant a common seller, contrary to the provisions of the first section of the forty-seventh chapter of the revised statutes. The jury returned a verdict of guilty; whereupon the defendant alleged exceptions to the ruling and instruction aforesaid.

J. P. Healy, for the defendant.

S. D. Parker, (county attorney,) for the commonwealth.

Dewey, J. The only question, that arises in the present case, respects the instructions to the jury, as to what facts would constitute a person a common seller of spiritous liquors.

The counsel for the defendant asked the court to instruct the jury, that at least three distinct sales of spiritous liquors must be proved, to sustain the allegation that he was a common seller of spiritous liquors. This prayer for instruction was, as it seems to us, correct. Three distinct acts of sale are necessary to constitute a common seller. Such has been the general rule as to a common barrator, and other cases of this nature. That it is insufficient to prove a single instance

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when the charge is that of a common offender, is quite clear. The number of distinct acts necessary to be proved seems to have been considered as three, at least. In *Commonwealth* v. *Odlin*, 23 Pick. 275, the point of doubt was, not whether three distinct sales were necessary to constitute the offence, but whether there must be three distinct sales to three distinct persons, which latter fact was not deemed essential.

The inquiry now is, whether one act of sale, accompanied by evidence of all the necessary arrangements for selling liquors, and being prepared, and ready, and willing to sell to all who might apply as purchasers, will constitute a common seller of liquors.

It is to be remarked, that the question to be settled is not whether the evidence detailed in the report would not have authorized the jury to have found that the defendant had made three or more sales. This was not submitted to them, but they were instructed that one sale, accompanied with the other circumstances of preparation for selling, and readiness to sell, stated in the instructions, would be sufficient to constitute the defendant a common seller. We think the proper course would have been to have submitted all the evidence to the jury, with instructions that three distinct sales were necessary, and that if the evidence satisfied them that the defendant had, during the period alleged in the indictment, made three or more sales of liquors, then they would find him guilty as a common seller. The case having been put to the jury under instructions of a different character, the verdict must be set aside, and a new trial ordered.

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Commonwealth *vs.* Rollin Doane.

A defendant indicted for larceny, in whose possession a portion of the cargo of a vessel is found, under circumstances which, if unexplained, would authorize a jury to presume a felonious taking by him, is not entitled, in order to negative the inference of an intent to steal, to give evidence of a custom for the officers of vessels to appropriate a small part of the cargo to themselves, or to prove that instances had occurred, in which the mates of vessels, under a claim of right, had appropriated to themselves parts of the cargoes in their possession. Such evidence is inadmissible, because the custom, which it purports to prove, is wanting in the elements of a legal custom, and cannot be sustained as such, and, if proved, would only be applicable to the officers of the vessel.

A person employed as a laborer, to discharge the cargo of a vessel, does not stand in the relation of a bailee to the property of which the cargo consists.

The defendant was indicted and tried in the municipal court for the city of Boston, with one Charles Crocker, for stealing half a ton of pig iron, of the alleged value of $19·00, the property of William E. Coffin and another. Both defendants being convicted, Doane brought his case to this court, on exceptions taken to the rulings and instructions of the judge of the municipal court.

The bill of exceptions stated, that,

On the trial, evidence was introduced on the part of the prosecution, tending to show that a large quantity — several tons — of pig iron, belonging to William E. Coffin and another, had been shipped on board the bark Ida, consigned to them at Boston; that the bark arrived at Boston; that the iron was discharged therefrom, and landed on one of the wharves of the city; and that a part of the same, namely, half a ton or thereabouts, was very shortly afterwards found in the possession of the defendants, under circumstances from which the jury might, if unexplained, infer a larceny thereof by them. A portion of the iron, consisting in part of long and in part of short pieces or pigs, so found in the possession of the defendants, was brought into court and exhibited to the jury.

The defendants, in order to explain their possession of the iron, and to rebut any inference therefrom of a larceny

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committed by them, alleged a purchase of the same from one or more of the mates or officers of the bark Ida; and, to establish this explanation by proof, introduced a witness, who testified that he was employed together with Crocker, one of the defendants, to assist in discharging the bark Ida; that after the cargo had been all taken out, and landed on the wharf, except a few short pieces, like those in court, they came on deck, leaving the second mate in the hold; that Crocker then slung a barrel, and let it down into the hold, and the second mate put some of the scrap iron (the short pieces) into it; that the witness and another man helped to hoist the barrel, which was taken forward by Crocker, and the contents placed on the top of some wood, which was lying on the deck there; that the barrel was sent down a second time, and returned in the same manner; that the first mate was about there whilst the cargo was discharging; that Doane, the defendant, was on board the bark, the same afternoon; that the witness and the others employed in discharging the vessel had been dismissed, before the iron was hoisted out of the hold in the manner above mentioned; and that he heard nothing stated as to any remnants in the hold being sold, or any thing of the kind.

The defendant then called a witness, who had been at sea for seven years in the capacity of captain and mate, to whom he proposed the following question: "Whether the officers of a vessel considered themselves entitled to any part of the cargo, under any circumstances." This question was proposed with a view to show "a custom for the officers of ships to appropriate to themselves a part — a small part — of the cargo," and, being objected to, was ruled to be inadmissible. The defendant then proposed to the witness the following question: "Whether he had known instances of mates having appropriated parts of cargo under a claim of right, and, if so, what, and what was the claim." This question, being objected to, was also ruled to be inadmissible.

The court, among other instructions to the jury, directed them, that if the officers of the ship fraudulently converted to

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their own use the whole of the said iron so shipped, before discharging the same, such conversion would not be larceny in them, or in persons in privity with them; but if, when the iron was discharged, they had separated a portion of it from the mass, and had retained the portion so separated in the hold of the vessel, for the purpose of subsequently converting the same fraudulently to their own use, and had so converted it, this would be larceny in them, and in those in privity with them in such transaction.

There was no evidence that the iron was bound in parcels or boxes, or that the bars thereof were in any way bound together.

R. F. Fuller, for the defendant, argued: 1. That the facts in evidence were sufficient to authorize the jury to infer, that the defendants obtained possession of the iron, with the privity and consent of the mates of the vessel.

2. If so taken, the defendants were bailees, and could not commit a larceny of that part of the cargo. 2 Russell on Crimes, 1033, 1092; *Commonwealth* v. *Brown*, 4 Mass. 580; *Dame* v. *Baldwin*, 8 Mass. 518.

3. The iron having been delivered to the defendants by persons who had a right to do so, the defendants could not be guilty of larceny in receiving it; to constitute larceny the taking must be *invito domino;* the *dominus*, in this case, was the party in possession. 1 Hale P. C. 507; 2 Russell on Crimes, 1050.

4. The evidence excluded had a tendency to show, that there was no intention on the part of the defendants to steal, and should therefore have been admitted. In a civil case, evidence of a custom cannot be received, unless the custom is reasonable; but in a criminal case, in order to show the intent, the reasonableness of the custom is not material. Roscoe Crim. Evid. 537; 1 Hale P. C. 508, 509; 1 Hume Crim. Law, 72. Where a thing is taken under an honest claim of right, the idea of a felonious intent is excluded *Commonwealth* v. *Weld*, Thacher Crim. Cases, 157.

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S. D. Parker, for the commonwealth. The evidence of usage was properly excluded on two grounds: 1. As irrelevant, no foundation being laid for it by the introduction of proof of a sale of the iron to the defendants; and, 2. As tending to prove an unreasonable, and therefore illegal, usage. *Homer* v. *Dorr*, 10 Mass. 26.

The argument, founded on the supposed character of the mates as bailees, is fallacious; they were not bailees, any more than are the servants in a hotel, but were mere servants. The authorities to this point, therefore, are not applicable.

The principle of law stated in the instructions is too clear to require any argument.

Dewey, J. The position taken by the counsel for the defendant assumes, that the facts testified to by the witness introduced on the trial were such as would authorize the jury to find, that the defendants received the possession of the pig iron by a purchase from the mates of the bark Ida; or, if not by a sale, that the taking was with the privity of the officers of the bark; and thereupon a question is raised, whether a larceny could be committed by the officers of the bark, of pig iron not in boxes, or bound up in parcels; the counsel for the defendant contending, that in case of possession by a bailee or common carrier, there could be no larceny of the property unless there was an actual breaking open of a cask, or bundle, and a withdrawal of a part from the mass committed to his charge. If it were necessary to examine with particularity this doctrine of conversion by a bailee, and to ascertain the acts that would give a decisive character to such conversion, as properly falling within the class of cases denominated a mere breach of trust, or that of larceny, I apprehend no doubt could arise, as to the instructions here given being sufficiently favorable to the case of one standing in the relation of a bailee of goods.

Treating the case as one of a charge of larceny by the officers of the bark, the court instructed the jury, that if the officers of the bark fraudulently converted to their own use the whole of the iron, such conversion would not be larceny in

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them, or persons in privity with them; but if they had separated a portion from the mass, and had retained the portion so separated, for the purpose of fraudulently converting the same to their own use, and had so converted it, this would be a larceny in them and those acting in privity with them in such acts. This was an instruction sufficiently favorable to the defendants, if they had connected themselves with the officers of the bark, and if the officers (meaning by this designation the mates) could properly have been considered as the bailees of this property. But the greater difficulty, on the part of the defendants, in sustaining their defence upon the distinction between cases of breach of trust and larceny, arises from the fact that the defendants were not bailees, or standing in any such relation to this property. One of them had no connection with the bark, even as one of the crew. It is not a case, therefore, raising any question of the technical distinction between larceny and breach of trust. No foundation was laid for raising that question.

Independent of the question already stated, arising upon the general instructions of the presiding judge, it is further, however, insisted, that a new trial should be granted for certain alleged erroneous rulings, as to the competency of evidence offered by the defendants. 1st. As to the evidence offered to prove a custom for the officers of vessels to appropriate to themselves a small part of the cargo. The proposed evidence was objectionable: 1. Because the defendants were not officers of the bark, and therefore the custom was inapplicable to the case, if it would have furnished a justification to the officers of the bark, had they been on trial for the offence. 2. But such a custom could not be sustained as a legal custom. It wants the elements of a legal custom. A custom to take another man's property and convert it to one's own use, without consent, or giving an equivalent, is a custom bad on its face, and cannot be supported. Nor was the second question proposed to be put to the witness competent evidence. The inquiry was, whether instances had not fallen under the observation of the witness of mates of

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vessels having appropriated parts of cargoes under a claim of right, and, if so, what was the claim. It surely will not be contended, that the fact, that similar offences have been committed by others, would constitute any legal defence for the parties charged in the present case, and to that extent the question was clearly incompetent.

If it were intended to raise the question, how far it would be competent to show that such rights had been claimed by other mates, with a view to show that this was taken under a supposed right or claim of title, and not feloniously, the question, if the mate had been on trial, might have become material and pertinent; as such practice, and such claim by others, standing in the same relation to the property, might have laid a foundation for the argument, that there was no *felonious* intent, and that a party taking the property under a claim of right, though a mistaken one, might place his defence upon that ground. But the defendants could not sustain a defence upon this ground, as they stood in no such relation to this property, and could have asserted no right under such custom.

If the defendants could show a *bona fide* purchase by them of this property, that would have availed them without any such proof of acts of other mates. If they did not purchase the property of any body, but feloniously converted the same to their own use, then the proposed evidence could not avail them, if in the case.

We perceive no ground for sustaining any of the exceptions taken, and they are therefore overruled.

Judgment is to be rendered on the verdict.

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Thomas B. Field *vs.* The Proprietors of Common and Undivided Land in Nantucket.

The liability of the owner or occupant of land, which has lain unenclosed, on enclosing or depasturing the same, to pay for the one half of a partition fence, under the Rev. Sts. *c.* 19, § 12, attaches *immediately* upon such enclosing or depasturing.

The right of an owner, who has erected a partition fence, to recover the value of one half thereof, against the owner of adjoining land, is complete by the commencement of proceedings to have the value of such half ascertained by fence viewers; and cannot be defeated by a sale of the land, and a notice by the purchaser, that he does not intend to occupy, or improve, or enclose it, subsequent to the application to the fence viewers, and notice of such application by them to the original owner, though previous to any further proceedings by them.

The St. of 1847, *c.* 102, repealing the Rev. Sts. *c.* 19, § 12, so far as relates to Nantucket, and providing that the depasturing only of unenclosed land in that island shall not render the owner or occupant liable for the erecting of a partition fence, is entirely prospective in its operation.

The authority of an attorney, who has been employed by a director or other analogous officer of a corporation, to appear for it, without any specific vote therefor, and who has been paid for his services by the corporation, is sufficiently proved.

This action was brought to recover the sum of $44·00, being the value of the one half of a partition fence between lands of the plaintiff and defendants, as ascertained by fence viewers, together with $11·36, the costs of ascertaining the same, under the provisions of the Rev. Sts. *c.* 19, § 12.

On the trial in the court of common pleas, before *Ward*, J., it appeared, on the part of the plaintiff, that on the 10th March 1838, he became the owner of a lot of land in Nantucket, adjoining land of the defendants, which was then unenclosed and unimproved. The plaintiff afterwards voluntarily built a fence on the line between his land and that of the defendants, and the defendants subsequently occupied their land for the purpose of depasturing. The plaintiff, thereupon, applied to two of the fence viewers of Nantucket, to ascertain the value of the one half of the fence so built by him, and to divide and assign to the parties their respective shares of the same. This application was made April 29th 1845; on the same day, the defendants were notified thereof by the fence viewers, and that they had appointed the 3d of May following for the hearing; the hearing was adjourned

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from time to time, from the 3d to the 24th of May, at the request of James M. Bunker, who appeared as counsel for the defendants; and, on the 24th May, after having viewed the premises, and heard the parties, the fence viewers made their award and assignment in writing, ascertaining the value of one half of the fence erected by the plaintiff, as aforesaid, at $44·00; which sum, together with $11·36, the costs of ascertaining the same, was demanded by the plaintiff of the defendants, on the 9th July 1845.

On the part of the defendants, it was shown, that, after the commencement of the said proceedings, George Easton, one of the proprietors, applied to them to assign to him, in severalty, the lot of land adjoining the plaintiff's land; and the same was accordingly set off to him, on the 13th of May 1845. On the 15th, George Easton conveyed the said land to his son Oliver W. Easton, who, on the 16th of the same May, gave the plaintiff a written notice that he had purchased the said land; that he did not intend to occupy, or improve, or enclose the same; and that he intended to avail himself of the exemption provided by statute for the owners of land not improving the same, but suffering it to remain unenclosed. The defendants relied on these facts, as furnishing a sufficient defence to the action.

The defendants also relied upon the *St.* of 1847, *c.* 102, which was passed after the commencement of the present action. This statute repeals the Rev. Sts. *c.* 19, § 12, so far as the same relates to the Island of Nantucket, and enacts, that "the occupant, or owner, of unenclosed land on the Island of Nantucket, when used only for depasturing, shall not be required to pay for any portion of the partition fences standing on the line between the same land and the land of the enclosure of any other occupant or owner."

The defendants further objected, that James M. Bunker, who, as stated in the certificate of the fence viewers, appeared before them and participated in the proceedings, as the counsel of the defendants, was not duly authorized for that purpose. On this point the evidence was as follows·

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Charles K. Whitman, one of the fence viewers, testified that he kept a book containing the minutes of their proceedings, which had been destroyed by fire; and that the hearing on the application of the plaintiff was adjourned from the 3d to the 24th of May, at the request of James M. Bunker, who appeared before the fence viewers, as counsel for the defendants, in company with Asa G. Bunker, their clerk. The latter produced the records of the defendants, from which it appeared that by a vote passed in February 1845, the agents and directors of the proprietors were authorized to retain T. G. Coffin as their counsel; but there was no vote authorizing the employment of Mr. Bunker. The clerk testified, that, feeling some embarrassment as to his duty, when the notice of the fence viewers was served on him, he called on George Easton, one of the agents and directors, who directed him to apply to James M. Bunker, if necessary; that he did so, and appeared, with Mr. Bunker, before the fence viewers. James M. Bunker testified, that he appeared before the fence viewers as counsel for the defendants; that he was employed by them; that he conferred with George Easton repeatedly upon the subject; that he believed that Easton called on him to go before the fence viewers, and that he went accordingly at Easton's request; that he charged the defendants a fee for his services, which was paid to him by their treasurer; and that at the time of these proceedings he was under a general retainer as counsel for the defendants.

The judge instructed the jury, that the facts proved by the defendants were not sufficient to prevent the plaintiff from recovering; and that the evidence, as to the employment of Mr. Bunker, was sufficient to warrant them in finding that he was duly authorized to appear as counsel for the defendants. The jury, accordingly, rendered a verdict for the plaintiff, for the amount sued for, with interest from the date of the writ; and the defendants, thereupon, filed their exceptions to the instructions.

J. H. Clifford, for the plaintiff.

T. G. Coffin, for the defendants.

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FORBES, J. This action is brought to recover the value of one moiety of a partition fence erected by the plaintiff, and the costs of ascertaining the same by fence viewers. The claim is made under 4th, 7th, and 12th sections of the 19th chapter of the revised statutes. The facts disclosed by the bill of exceptions, and the papers referred to, are as follows. In 1838, the plaintiff purchased a lot of land in Nantucket, and subsequently erected the fence in question. At the time the fence was erected, the adjoining land, owned by the defendants, was unoccupied. So long as the land of the defendants remained in that condition, the whole burden of making and maintaining the division fence rested on the plaintiff; but whenever the defendants enclosed their land, or used it for the purpose of depasturing, it became their duty to maintain one half of the partition fence; and, inasmuch as the whole fence had been erected by the plaintiff, and the defendants, by their occupancy, availed themselves of the labor and expense of the plaintiff in erecting it, the legislature have thought it to be reasonable that a just compensation should be made therefor by the defendants. The statute does not provide that the liability of the defendants should arise after the land had been enclosed, or occupied, any limited period of time; but whenever the defendants enclosed their land, or depastured it, their liability arose, and the right of the plaintiff to an indemnity became absolute. It does not appear how long, previously to the 29th day of April 1845, the defendants had occupied their land; the notice of the fence viewers, of that date, states merely that it is "the fence voluntarily built by the plaintiff, and which stands on the line between his land, in Nantucket, and the land heretofore unimproved, but now occupied by you, the said corporation, for the purpose of depasturing." Nor is it material; for, assuming the fact to be as is here stated, the right of the plaintiff to compensation, under the statute, is undeniable. The defendants make no objection to the regularity of the proceedings by the fence viewers, in matter of form; but they contend that before the proceedings

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were completed, certain changes had taken place, which rendered them nugatory. The proceedings of the fence viewers were completed on the 24th of May, and on the 13th of May, upon the application of George Easton, one of the proprietors, there was set off to him, in severalty, the lot adjoining to that of the plaintiff. On the 15th of May, George Easton conveyed the land, thus set off to him, to his son, Oliver W. Easton, who, on the next day, gave notice of the purchase to the plaintiff, and that he did not intend to occupy or improve the land at present; that he should not enclose it, but would avail himself of the statute, &c. These transactions, which took place after proceedings had been commenced pursuant to the statute, cannot change the rights of the parties. The plaintiff had, at that time, a legal claim to contribution, and, although the defendants, or their assignees, might avoid the burden of maintaining their moiety of the fence, in the manner pointed out by the statute, yet a bare notice of an intention not to occupy would not have that effect. The Rev. Sts. *c.* 19, § 15, provide that, "if any person shall *lay his lands common*, and determine not to improve any part of the same adjoining the fence that may have been divided as aforesaid, and shall give six months' notice of his determination to all the adjoining occupants of the land, he shall not be required to keep up or support said fence during the time that his lands shall so lie common and unimproved." In this section, the determination not to improve is coupled with the act of laying the land in common; and both must concur, together with six months' notice, in order to exonerate the proprietor. It does not appear, in the present case, that O. W. Easton ceased to occupy his land, and it does appear that the six months' notice was not given; we think it to be very clear that this defence cannot be maintained. Nor is there any force in the second objection. The *St.* 1847, *c.* 102, was passed after the present action was commenced, and nearly two years after the proceedings before the fence viewers were instituted. That act relieves a certain description of occupants on the island of Nantucket

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from the burden of maintaining partition fences; it was prospective in its operation, and it neither ought to have, nor was it designed to have, any effect upon the claim of the plaintiff.

The defendants also objected, that J. M. Bunker, Esq., named in the record of the fence viewers, was not authorized to appear for them, as counsel, in these proceedings. If the defendants were properly notified by the fence viewers, it is difficult to perceive how the authority of Mr. Bunker becomes material; the evidence upon this point, however, has been reported, and it appears to us that it was sufficient to warrant the jury in finding that Mr. Bunker was authorized to appear as counsel for the defendants; and, indeed, unless the veracity of the witness was impeached, we do not see how the jury could have arrived at any other conclusion. The exceptions are overruled, and judgment is to be entered for the plaintiff.

Peter F. Ewer *vs.* George Myrick, Jr.

A promissory note, for the payment, "ten years after date," of "seven hundred and fifty dollars, with interest semiannually, fifty dollars of the principal to be paid annually until the whole is paid," is a contract that the interest shall be paid semiannually, that fifty dollars of the principal shall be paid annually, and that the whole amount of the note, principal and interest, shall be paid in ten years after date.

The promisee, by an agreement under seal, executed on the same day with the note, covenanted with the promisor, that "if said note should not be paid at the expiration of the said ten years," he would "give up said note" to the promisor, provided the latter should execute to him a quitclaim deed of certain land mentioned in the agreement. It was held, that this agreement (assuming that the note and agreement constituted an entire transaction, which the court did not decide) did not preclude the promisee from enforcing payment of the interest, and such instalments as should become due, before the expiration of the ten years.

This action was brought to recover the amount due on a promissory note, of which the following is a copy:

"$750. — Nantucket, December 4th 1838. Ten years after date, I, Daniel Bunker, as principal, and George

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Myrick, jr., as surety, for value received, promise to pay to Peter F. Ewer, or his heirs, the sum of seven hundred and fifty dollars, with interest semiannually. Fifty dollars of the principal to be paid annually until the whole is paid.

Daniel Bunker.
George Myrick, jr

Witness, Josiah Hussey, Notary Public."

Indorsements. — "December 4th 1839. Received of George Myrick, jr., ninety-five dollars of the within amount.

$95·00 Peter F. Ewer.

$13·34. — Nantucket, June 10th 1844. Received thirteen 34-100 dollars.

$13·34. — September 18th 1844. Received thirteen 34-100 dollars.

$13·34. — December 21st 1844. Received thirteen 34-100 dollars."

The plaintiff insisted that he was entitled to recover as upon a note for seven hundred and fifty dollars, payable by annual instalments of fifty dollars each, with interest semi-annually.

The defendant contended that the plaintiff could not maintain his action for any part of the sum mentioned in the note; *first*, on the construction of the note itself, and *secondly*, by reason of his having executed an instrument, which the defendant produced and offered in evidence, and of which the following is a copy:

"Whereas George Myrick, jr., of Nantucket, merchant, has this day endorsed to me, the subscriber, Daniel Bunker's note for seven hundred and fifty dollars, payable in ten years from the fourth day of December, A. D. 1838. — And whereas said Myrick has received from said Bunker and others a deed of a certain lot of land in that part of Nantucket called Newtown, with the buildings thereon, fronting and adjoining Beaver Street, and correctly described in said deed, as security for the payment of said note. Now, if said note should not be paid at the expiration of the said ten years, then I, the sub-

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scriber, do obligate myself to give up said note to said Myrick, provided he shall execute to me a quitclaim deed of said premises. And I do bind myself and my heirs to the true performance of this contract. In testimony whereof, I have hereunto set my hand and seal, at Nantucket, this fifth day of December, A. D. 1838.

Peter F. Ewer, and seal.

Witness, Josiah Hussey, Notary Public and Counsellor at Law.

In the note is added, Fifty dollars, to be paid annually, over and above the interest, but if not paid annually, I do agree to wait until the termination of ship Phœnix's voyage — Hussey, master. Peter F. Ewer."

The defendant also averred his readiness, if the plaintiff would accept the same, to execute a deed as mentioned in the foregoing instrument, and to deposit the same with the clerk of the court, to be delivered to the plaintiff, on the expiration of ten years from the date of the note, if the latter should not then be paid.

The action was commenced by a writ returnable in this court, bearing date June 9, 1845.

Mr. Justice *Dewey*, before whom the cause was tried, being of opinion that the said instrument constituted no legal defence to the action, it was thereupon agreed by the parties, that judgment should be rendered against the defendant as upon a default, if the whole court should be of opinion that the action could be maintained; and that otherwise the plaintiff should become nonsuit.

The defendant also moved the court for a stay of execution, if judgment should be rendered against him, in order that he might have an opportunity to avail himself of his rights (if any) under the bond.

T. G. Coffin, for the plaintiff. This action can be maintained, unless something has been done on the part of the plaintiff to defeat it. The defendant contends, that the giving of the sealed instrument has that effect. The condition of that instrument is, that if the note should not be

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paid at the expiration of ten years, the plaintiff should give it up, provided the defendant would then give him a quit-claim deed of certain estate, which Bunker and others had conveyed to the defendant. This covenant did not restrain or estop the payee of the note from seeking payment of it, according to its tenor, by legal process, if necessary. The agreement under seal, and the note, being executed on different days, do not constitute one transaction. The only thing contemplated by the former was, that after paying the interest and annual instalments, as they should fall due, the promisee would then take the deed for such balance as should remain, if the defendant should see fit to give it. A part of the principal would necessarily remain due, at the expiration of ten years, if nothing more than the $50 and interest should be annually paid. If these positions are correct, there is no sufficient reason for a stay of execution.

J. H. Clifford, for the defendants. The note, construed independently of the bond or agreement of the plaintiff, is a contract on the part of the defendant, as surety for Bunker, to pay the plaintiff or his heirs $750, "ten years after date." Within that period, the defendant did not intend to give the plaintiff a right of action against him for any part of the principal; he agreed that the interest should be paid semiannually, and that has been done. In order to make the contract, to pay "ten years after date," consistent with the subsequent stipulation, that "fifty dollars of the principal" should "be paid annually," the latter must be considered as a *privilege* granted to the promisors, and not as an obligation imposed upon them. They were to pay the $750 ten years after date; but if, during the period whilst the note was running to maturity, they should wish to diminish the amount on which they were paying interest, by the payment of $50 a year, they were to have the right to do so, but without subjecting the surety to a suit for any part of the principal, before the expiration of the ten years, for which the credit had been expressly given. Unless this is the true construction, the stipulation for ten years' credit is without

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any meaning or effect; for, if the obligation of the contract is to be found only in the words "fifty dollars of the principal to be paid annually until the whole is paid," then there is a credit of fifteen years upon a portion of the note; as a payment of $50 annually would require that term for the extinguishment of the whole debt.

But, in the second place, the note and bond constituted but one transaction. The fact that the note was dated on the 4th of December, and the bond on the 5th, is immaterial. The defendant signed the note on the 5th when he received the bond, and the plaintiff so avers in the instrument itself. In the language of the court in *Makepeace* v. *Harvard College*, 10 Pick. 302, "These several instruments made at one and the same time, and having relation to the same subject matter, must be taken to be parts of one transaction, and construed together for the purpose of showing what was the true contract between the parties." See also *Hunt* v. *Livermore*, 5 Pick. 395; *Barnard* v. *Cushing*, 4 Met. 230.

If "the true contract between these parties" is to be carried into effect, it is manifest that what was offered to be shown in defence on the trial was the true contract, namely; that the defendant, at the request of the plaintiff, consented to become surety in the note, for the payment of which the plaintiff gave Bunker a credit of ten years; and that if, at the expiration of that time, Bunker did not pay the note, the defendant was to convey to the plaintiff certain real estate which had been previously conveyed to him by Bunker for the purpose, and be thereby discharged from all liability; or that the defendant should then pay the note. This the defendant now offers to do, and he asks the court to hold the plaintiff to his contract.

This case is clearly distinguishable from those cases, upon the principle of which, it is supposed, the opinion of the judge at the trial was founded, namely, *Dow* v. *Tuttle*, 4 Mass. 414; *Perkins* v. *Gilman*, 8 Pick. 229; *Central Bank* v. *Willard*, 17 Pick. 150; *Allen* v. *Kimball*, 23 Pick. 473. In all these cases, it is believed, the adjudications

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were upon negotiable notes; and the court held either that the instrument relied on to defeat the note was a collateral agreement, or, if it was to be taken as a part of the contract, that it was repugnant, and therefore could not be set up against it. In the present case, the bond was as much a part of the original contract between these parties as the note; and if the note was a contract to pay "ten years after date," the bond is not repugnant to it, and constitutes a good defence to this action.

If the court should be of opinion that the action can be maintained, the dictum of Parsons, C. J., in *Dow* v. *Tuttle*, above cited, that the instrument relied on as a defeasance "may, perhaps, at law, support a motion to stay proceedings, by granting imparlances until the plaintiff could put it in suit, consistent with the agreement," is an authority in favor of the motion of the defendant for a stay of execution.

Forbes, J. It was objected, on behalf of the defendant, that no part of the principal of this note would become due until the expiration of ten years from its date. This objection is answered by the terms of the contract, which leave nothing open to construction; the promise is express that fifty dollars of the principal shall be paid annually. It was then contended that, if the note is payable by instalments of fifty dollars a year, the whole amount of seven hundred and fifty dollars would not become due until the expiration of fifteen years from the date. By suppressing a part of the agreement, this consequence might follow. The language of the contract may not be critically exact, but the meaning of the parties is plain enough. They agreed that the interest should be paid semiannually, that fifty dollars of the principal should be paid annually, and that the whole amount of the note, principal and interest, should be paid in ten years after date. All this appears upon the face of the note, and however inartificial its language may be, we are to look to the meaning of the parties only, which in the present case is free from doubt.

The real defence is to be found in the bond or sealed agreement, and the memorandum appended to it. This evi

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dence was introduced by the defendant, and his counsel contends that the note and bond were made at the same time, that they relate to the same transaction, and are to be read together as evidence of one entire contract. If the recital in the bond refers to the note in suit, the plaintiff would seem to be precluded from denying that the note and bond were made at the same time, and related to the same transaction; but whether they are evidence of an entire contract, or of mutual and independent contracts, we do not think necessary to determine; for, assuming that the contract was entire, it does not disclose an agreement not to enforce payment of the interest, and such instalments as should become due, before the expiration of the ten years. The agreement of the plaintiff was, that if the note should not be paid at the expiration of ten years, it should be given up to the defendant, upon his executing a quitclaim deed of the land described in the bond. There was, certainly, no express agreement not to collect the instalments as they should fall due, nor is such an intention to be fairly inferred. The defendant was surety for Bunker, and had received a conveyance of the land as an indemnity. But the plaintiff evidently relied, not upon the land, but upon the name of the defendant, as security for his claim. If it was optional with the defendant to omit paying the interest and instalments until the maturity of the note, and then to discharge himself, by a conveyance of the land, his name to the note gave no additional security to the plaintiff; and no good reason is perceived why the plaintiff did not, originally, take the land as security without the intervention of the defendant; especially as in that manner he might have availed himself of the intervening rents and profits, which, for aught that appears, are now in the hands of the defendant. We think the true construction of the agreement to be this: the defendant promised that the interest and instalments should be paid, at the several periods mentioned in the note, until the expiration of ten years; the plaintiff entered into the contract with reference to that promise, and upon the supposition that it would be punctually performed. At the expiration of ten years there would

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remain due upon the note the sum of three hundred dollars and interest thereon for six months; and in payment of this sum the plaintiff stipulated that he would receive a deed of the land, at the option of the defendant. It may be further observed, that the bond does not describe the note correctly in this respect: it omits the instalments of fifty dollars a year, but the memorandum supplies this omission, and not only states that the fifty dollars is added in the note to be paid annually, but contains a conditional agreement, by which the annual payment is postponed until the termination of the voyage of the ship Phœnix, (an event which probably happened in due time, as no notice is taken of that agreement in the defence;) but this agreement discloses an understanding between the parties that the instalments might be demanded before the note became due. It is the opinion of the court that the plaintiff is entitled to judgment, and that the motion of the defendant for a stay of execution ought not to be granted.

Peter F. Ewer *vs.* Thomas Coffin.

A personal service by notice, in order to give the courts of one state jurisdiction of a cause, the defendant in which resides in another, so that a judgment in such cause may be enforced in the latter state, must be such a notice as a court is competent to direct, and which can be served within its jurisdiction.

Where a court in Rhode Island, in which an action had been entered against a defendant who was not resident within the state, and who did not appear, ordered personal notice of the pendency of the suit to be given him, which was effected by the reading of the writ and order of the court in his presence, by the sheriff of Nantucket, within his precinct, it was held, that this notice was not such personal service, as to be the foundation of a judgment, which might be enforced in this state; whatever effect it might be entitled to, (which the court did not decide,) if the court in Rhode Island had also obtained jurisdiction of the cause by an effectual attachment of property.

An attachment of property, in order to give the courts of one state jurisdiction of a cause, the defendant in which resides in another, so that a judgment in such cause may be enforced in the latter state, must not be merely formal or nominal, but actual and effectual; and, unless the record of the judgment discloses such an attachment, no effect ought to be given to the judgment, out of the state in which it was rendered.

Where an action was commenced in Rhode Island against a person not resident therein, and the only service of the writ was effected by an attachment of articles

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of trifling value, set out to the officer by the plaintiff, as the property of the defendant, and by an attested copy of the writ and of the officer's doings thereon being left with the plaintiff, who was in possession of the articles attached, it was held, that this was a merely nominal or formal attachment, and not such an actual and effectual one, as to be the foundation of a judgment, which might be enforced in this state.

If the record of a judgment, rendered in another state, set forth that notice of the action was given to the defendant, or that property was attached, and also what notice was given, or in what manner the attachment was made, the court will judge, upon the facts so stated, whether the notice or attachment was sufficient.

The jurisdiction of state courts being limited by state lines, it is difficult to see how the order of a court, served upon a party out of the state in which it is made, can have any greater effect than knowledge brought home to the party in any other way.

Mere knowledge of the pendency of a suit in the courts of another state, without service of the process, or an appearance, is not sufficient, of itself, to compromise the rights of the party in this state.

This was an action of debt, commenced in the court of common pleas, on a judgment of the court of common pleas for the county of Providence, in the state of Rhode Island, rendered against the defendant and others, on the fourth Monday of November, 1836.

On the trial in the court below, before *Colby*, J., the following facts appeared in evidence. The action in which the judgment was rendered was commenced on the 7th of May, 1833, by a writ returnable on the fourth Monday of the same May, in which the plaintiff was described as of Providence, in the county of Providence, and state of Rhode Island, and the defendant as of Nantucket, in the commonwealth of Massachusetts. On the same day, the officer to whom the writ was delivered for service, returned thereon that he had "made service of this writ by attaching one pair of canhooks set out to him by the plaintiff, as the property of the defendants, and had left a true and attested copy of the writ, with his doings thereon, with Peter F. Ewer, he being in possession of the same." The action was duly entered, and a declaration filed, at the return term; and the defendants not appearing, it was ordered by the court, on motion of the plaintiff, that notice be given to the defendants, at least thirty days before the sitting of the court, at the next term, of the pendency of the suit, and that the action stand continued

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At the next and every succeeding term, until the November term 1836, the defendants not having been served with notice, the order was renewed in the same form. At the last mentioned term, notice having been "duly and personally served upon the defendants," who did not appear, they were defaulted, and judgment rendered against them.

The order did not specify the form of the notice, or the manner in which it was to be served; but the form made use of was a duly attested copy of the plaintiff's writ, and of the order of the court thereon; and service thereof was made upon the defendant by the same being read to him, at Nantucket, on the 10th of October, 1836, by the sheriff of the county of Nantucket. The defendant never was an inhabitant of Rhode Island, and was not within that state, at any time during the pendency of the suit on which the judgment was rendered. The proceedings in that case were all regular and conformable to the laws of Rhode Island.

The parties agreeing, that, upon these facts, the court should render such judgment as might be proper, the judge directed a judgment to be entered for the plaintiff, and the defendant thereupon filed exceptions.

T. G. Coffin, for the plaintiff. The courts in Rhode Island had jurisdiction of the subject matter of the suit. Their judgment would carry into effect an attachment of personal or real estate of a non-resident found within their jurisdiction; such attachment, without notice to the defendant, would create a lien upon the property attached; and judgment duly rendered would enable the attaching creditor to perfect his lien. The judgment is, therefore, conclusive as to the fact of indebtedness. *Napier* v. *Gidiere*, 1 Speers Eq. 215. A judgment is conclusive under the act of congress of 1790, if the court has jurisdiction of the cause, and of the parties.

The court in Rhode Island had jurisdiction of the cause if they had also jurisdiction of the parties, the judgment conclusive to every intent and purpose. In *Hall* v. *Williams*, 6 Pick. 232, it is said by Parker, C. J. on page 239

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that "if it appeared by the record, that the defendants had notice of the suit, or that they appeared in defence, we are inclined to think, that it could not be gainsaid; for, as we are bound to give full faith and credit to the record, the facts stated in it must be taken to be true judicially." See also *Miller* v. *Miller*, 1 Bailey, 242. In this case, it does appear by the record, that the defendant had notice. He was duly notified of the pendency of the action, and regularly summoned to appear.

This judgment, at common law, would be *prima facie* evidence of debt, and would throw the burden upon the defendant, to show that it was irregular or erroneous. He could not show, against the record, that he had no opportunity to defend, or that he was not summoned, or that he had good ground of defence; because the record shows that he was summoned to appear before a tribunal having jurisdiction of the subject matter, and that he did not appear.

The jurisdiction was not assumed upon constructive notice; actual notice was given. The person of the defendant, it is true, was not within the jurisdiction of the court, at the time of the notice; but the court had jurisdiction of the cause, and actual notice of the pendency of the action was given to the defendant; and every legal purpose of notice, in order to entitle the judgment to full faith and credit, was therefore answered as fully, as though it had been served upon him within the limits of the state of Rhode Island.

The case of *Gleason* v. *Dodd*, 4 Met. 333, is not analogous to this case. The party there had no notice, nor did the party to the record appear, or authorize an appearance.

The law of this commonwealth (Rev. Sts. c. 92, § 3) provides that notice shall be given of the pendency of an action, when a party is not resident within the state, in like manner as this notice was given.

H. H. Fuller & R. F. Fuller, for the defendant.

Forbes, J. This is an action of debt upon a judgment rendered in the court of common pleas for the county of Providence, in the state of Rhode Island. The action upon

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which that judgment was rendered was commenced in 1833; the defendants have always resided within this commonwealth; they were not served with process within the state of Rhode Island; they never appeared to the action, and judgment was finally rendered against them upon default. At the May term, 1833, the court ordered notice of the pendency of the suit to be given to the defendants, at least thirty days before the then next term. The notice was not given, and the action was continued, under similar orders of notice, until 1836. In October 1836, notice was served upon the defendants within this commonwealth, by the sheriff of Nantucket. Upon the original writ the officer returned, that he had made service as follows, viz. by "attaching one pair of can-hooks set out to me by the plaintiff as the property of the defendants, and have left a true and attested copy of this writ, with my doings thereon, with Peter F. Ewer, he being in possession of the same." It is agreed that these proceedings were conformable to the laws of Rhode Island; and the question is, whether a judgment obtained in this manner, in another state, can be enforced within this commonwealth. The counsel for the plaintiff contends that the court had jurisdiction of the *cause*, and if they had jurisdiction of the *parties*, the judgment is conclusive; and that, it appearing by the record that the defendants had notice, they are precluded or estopped from denying the validity of the judgment. In support of his views, as to the conclusiveness of the judgment, he has referred the court to a dictum of Parker, C. J. in the case of *Hall* v. *Williams*, 6 Pick. 239. "If it appeared by the *record* that the defendant had *notice*, &c., we are inclined to think that it could not be gainsaid." The chief justice nowhere defines the description of notice to which he refers; but he is speaking of legal proceedings, and it may be inferred from the context, that he referred to a legal notice; such a notice as a court is competent to direct, and which can be served within its jurisdiction. In this sense, the language of the chief justice is consistent with a subsequent decision in the same volume, (*Woodward* v. *Tremere*, 6

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Pick. 354,) in which it was held, that knowledge of the pendency of a suit is not sufficient without service of process or an appearance. The jurisdiction of state courts is limited by state lines, and, upon principle, it is difficult to see how the order of a court, served upon a party out of the state in which it is issued, can have any greater effect than knowledge brought home to the party in any other way. In the present case, although the record states that personal notice was given, yet it also discloses the manner in which it was given; there is nothing in the record inconsistent with the facts agreed; and, indeed, the facts may be gathered from the record itself. But without deciding what effect, if any, is to be given to such a notice and record, whenever it appears that the court obtained jurisdiction of the cause, by an effectual attachment of property, we are satisfied that if the record does not disclose such an attachment, no effect ought to be given to the judgment out of the state in which it is rendered. Were it otherwise, the local legislation of any one state might, indirectly, compromise the interests of the inhabitants of all the other states, although they were never within its limits, and never held property under its jurisdiction. The only evidence that the defendants had property in the state of Rhode Island, is to be found in the return upon the writ. The property returned as attached is of little value, and the officer does not assume the responsibility of returning it as the property of the defendants. He returns, that it was set out to him by the plaintiff as the property of the defendants. At best, the return discloses merely the acts or declarations of the plaintiff, which ought not, in any manner, to prejudice the interests of the defendants. The return may be literally true, and the defendants may not have been, and probably they were not, the owners of the property attached. We consider this attachment to be formal or nominal only, sufficient, perhaps, to give the courts of that state jurisdiction, according to their laws, and to authorize them to render a judgment, but not of such a character as to justify this court in enforcing the judgment against the defendants.

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Levi Whitney *vs.* Richard Walsh.

The sentence, or decree, of a court of admiralty and maritime jurisdiction, *in rem*, is binding on all the world, as to matters which were directly in issue therein: and, therefore, where an information was filed in the district court of the United States against certain goods alleged to have been imported contrary to law, and, upon the proceedings thereon, the court adjudged and decreed, that the said goods be and remain forfeited to the United States; — it was held, that the judgment was conclusive evidence, that such goods were liable to forfeiture, not only at the time of the decree, but also at the time of their importation.

The plaintiff, some time in April, 1845, purchased, paid for, and received, of the defendant, forty-six half and six quarter boxes of cigars, which, on the 9th of May following, were seized, by the collector of Boston, as forfeited, for having been imported into the United States contrary to law. The seizure was followed by an information, filed in the district court of the United States, on the 27th of the same May, in which it was alleged, in substance, that the cigars were brought from a foreign port into the United States, and were unladen and delivered at the port of Boston, without any license or permit therefor. Public notice was directed by the court to be given of the information, and of the time and place of trial thereon, and was given accordingly by the marshal of the district. On the 24th of June following, which was the time assigned for the trial, no person appearing to show why the cigars should not be condemned for the cause alleged in the information, it was adjudged and decreed by the court, that the cigars be and remain forfeited to the United States.

This action was brought to recover back the purchase money.

On the trial in the court of common pleas, before *Washburn*, J., the plaintiff, in order to prove that the cigars were smuggled, and liable to seizure, at the time of the sale to him, introduced the record of the proceedings in the district court, from which the facts above stated appeared; but there was no evidence that the defendant knew of the pendency

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of these proceedings, further than was furnished by the record.

The defendant contended, that the record was not conclusive evidence against him, that the cigars were liable to seizure, at the time of the sale to the plaintiff. But the court ruled, that "the record, if unimpeached, was conclusive evidence of whatever was directly in issue and joined in that case, and was binding on all parties who could be affected by the decision of it, and that evidence in behalf of the defendant, that the cigars were not smuggled, was not competent to be offered."

The jury returned a verdict for the plaintiff, and the defendant alleged exceptions to the ruling aforesaid.

E. D. Sohier, for the defendant. 1. It is manifest that the record of the proceedings in the district court, according to the principles ordinarily applicable to the effect of judgments, would not be evidence against the defendant who was not a party to it; but, being a proceeding *in rem*, it is said that all the world have notice and are parties, and are consequently bound by the proceedings. Conceding that the record is admissible, the question is, to what extent is it evidence against this defendant? The court below held it to be conclusive, that the cigars were forfeited before they were sold by the defendant. In regard to their admissibility and effect as evidence, the judgments of foreign and domestic courts stand upon the same footing. 2 Phillips on Insurance, 686, 721. It is admitted that the record is conclusive evidence of the fact of condemnation; but, as to the facts which constitute the grounds of the condemnation, those only are conclusively proved by the record, which it distinctly sets forth. The English decisions, with reference to this subject, are contradictory. In one class, the judgment is regarded as conclusive, even as to inferences made by the court; in the other, only as to the grounds of the judgment. The judgment, in this case, sets forth no ground of condemnation, except that no person appeared. All the English cases are collected in 2 Smith's Leading Cases, 446. In one

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class of these cases, the judgment is held to be conclusive only as to the grounds of it which are stated. In *Christie* v. *Secretan*, 8 T. R. 192, it was held, that the sentence of a foreign court of admiralty is only conclusive, in an action on a policy of insurance, as to the express ground of the sentence, but not as to any of the premises (noticed in the consideration part of it) that led to the adjudication. In *Dalgleish* v. *Hodgson*, 7 Bing. 495, it is laid down, that the sentence of a foreign court of admiralty is not conclusive as to the ground of condemnation, unless it be explicitly stated what the ground is. See also *Fisher* v. *Ogle*, 1 Camp. 419. This seems to be the extent to which the courts have gone in this commonwealth. In *Robinson* v. *Jones*, 8 Mass. 536, it is stated, that the sentences of foreign courts of admiralty are conclusive only when they distinctly and specifically state the causes of condemnation. See also *Bradstreet* v. *Neptune Ins. Co.* 3 Sumner, 600.

2. It is contended, further, on the authority of *The May*, 9 Cranch, 126, 144, that the record is evidence only against those persons who were or might have been parties to it; and, consequently, is not admissible at all against the defendant, who, not being notified, was not a party to the proceedings, and had no opportunity of becoming so. If the case cited does not show that the judgment in the district court was inadmissible altogether, it proves, at least, that it was not admissible to the extent relied on. The reason why, in a case of insurance, the owners are bound by a proceeding against the vessel, is because the captain is their agent.

R. Rantoul, Jr. & D. H. Mason, for the plaintiff. The district court being a court of exclusive jurisdiction, its judgments are conclusive, and binding on all the world, until reversed. *Gelston* v. *Hoyt*, 3 Wheat. 246, 312; *The Mary Anne*, Ware, 104. It is said that the judgment is not admissible against the defendant, who has had no notice of the proceedings; but the public notice, which is given in cases of this description, is notice to every body; and it is not pretended that there was any irregularity in the proceedings of the district court.

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WILDE, J. This was an action of assumpsit, to recover back the purchase money paid by the plaintiff to the defendant, on the purchase of certain cigars alleged to have been smuggled, and liable to seizure, at the time of the purchase. It appeared in evidence, by a copy of the record of the district court of the United States, that the said cigars were seized, and condemned, and decreed forfeited, by said court; and it was thereupon ruled, by the presiding judge, that the record was conclusive evidence of whatever was in issue in that case, and was binding on all parties who could be affected by the decision; and that evidence to prove that the cigars were not smuggled was incompetent. The defendant's counsel excepted to this ruling; but we are all of opinion that the exception cannot be sustained. It is a well established principle, that the sentence or decree of a court of admiralty and maritime jurisdiction, *in rem*, is binding on all the world as to the points in issue and judgment thereon. 3 Dall. 86. It was objected, that there was no evidence to prove that the defendant knew of the proceedings in the district court, further than was furnished by the record thereof; and no further evidence, as we think, was necessary. Public notice was ordered, and due service made, according to law in such cases; and all persons interested are presumed to have notice of the pendency of the suit. 9 Cranch, 146; Ware, 104. It was also objected, that although the decree of forfeiture might be conclusive evidence to prove that the cigars were liable to forfeiture at the time of the decree, or that of filing the information, yet it was no proof that they were liable to seizure at the time of the sale. But there seems to be no foundation for this argument. The information alleges that the cigars were imported into the United States contrary to law, and were unladen at the port of Boston without a permit, &c. This was the sole charge upon which the cigars were condemned and declared forfeited; and as the sale and delivery were after the importation, the cigars consequently must have been liable to seizure at the time of the sale. *Exceptions overruled.*

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Commonwealth *vs.* Jabez M. Davidson.

In an indictment for cheating by false pretences, an allegation, that the prosecutor, by means of the false representations, was induced to deliver and did deliver to the defendant certain goods, "as upon a sale upon credit," is sufficiently proved by evidence of a sale of the goods to the defendant, on his promissory note payable in four months.

An indictment for cheating by false pretences alleged, that the defendant represented a firm of which he was a member to be then owing not more than three hundred dollars, and evidence was given of a representation by him, that the firm did not then owe more than four hundred dollars; — this was held to be a fatal variance.

One of the representations, set forth in an indictment for cheating by false pretences, and proved, was, that the defendant gave a false name; and the prosecutor testified that this misrepresentation had no influence in inducing him to part with his goods; it was the duty of the court, either at the time, or in the charge, to instruct the jury that such misrepresentation was not, upon the evidence, proved to have been an inducing motive to the obtaining of the goods by the defendant.

In an indictment for cheating by false pretences, it was alleged, that the defendant represented that he was a partner in trade with another person, who had put into the partnership a capital of one thousand dollars, which they (the defendant and his partner) then had invested and employed in their partnership business, and that the copartners were worth property of the value of fifteen hundred dollars, and did not owe debts amounting to more than three hundred dollars; — it was held, that evidence of the individual indebtedness of the defendant and his partner was not admissible to prove that the representations as to the solvency of the partnership were false.

Where a party, on notice and demand, produces books or papers, which are inspected by the party calling for them, and used as evidence by him, such books or papers thereby become evidence for the party producing them: and, therefore, where the partner of a defendant, who was on trial for cheating by false pretences, being called by the latter as a witness for him and examined in chief, produced the account books of the firm, on notice and demand by the prosecuting officer, who thereupon cross examined the witness with reference to two entries in the books, and exhibited them to the jury, with reference to those two entries; it was held, that the books thereby became evidence for the defendant, as to their entire contents, and not merely with reference to the two entries for which they were originally introduced.

The defendant was indicted and tried in the municipal court of the city of Boston, for the offence of cheating by false pretences.

The indictment alleged, that the defendant, on the 2d day of February 1847, at Boston aforesaid, "with intent to cheat and defraud one Artemas Lee, one Samuel L. Harding, and one George H. Jones, merchants and copartners in trade, of their goods, under pretence of buying them fairly, did, then and there, unlawfully, knowingly and designedly, falsely

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pretend and represent to said Lee, Harding, and Jones, that his name was J. Moulton, — that he was a copartner in trade with one William Berry, who had put into the partnership fund the sum and capital of one thousand dollars, which the defendant and Berry then had invested and employed in their partnership business, — that the said copartners were worth property of the value of fifteen hundred dollars, and did not owe debts amounting to more than three hundred dollars, — that the defendant had an order from the country for a lot of palm leaf hats, to be sent out of the city of Boston, which he wished to purchase on credit of the prosecutors, in the honest course of trade, — and that the prosecutors, believing such false pretences and representations, and being deceived thereby, were induced to deliver and did deliver to said defendant, as upon a sale upon credit to him and Berry, two hundred dozen of palm leaf hats, &c." The indictment went on, in the usual form, to negative the several representations, alleging, that the defendant's name was not J. Moulton, — that Berry never invested one thousand dollars, or any other sum, in the capital of the firm, but was a poor person, — that the partners were not worth fifteen hundred dollars, but were poor and insolvent, and unable to pay their debts, — that their debts exceeded three hundred dollars, — that the defendant had no order, &c.

At the trial, Samuel L. Harding, one of the firm of Lee, Harding, and Jones, was called as a witness on the part of the prosecution, and testified, on his examination in chief, that said Davidson came to him some few days previous to the 2d day of February mentioned in the indictment, and said he wanted to purchase some of their goods, — that he represented himself as J. Moulton, and that he was one of the firm of William Berry and company, — that he, Harding, questioned him somewhat as to his responsibility, — that the defendant told him that his partner, Berry, put into the concern one thousand dollars, and that he himself had other property to the amount of several hundred dollars, which was in the concern, making a capital of fifteen hundred

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dollars, at least, — that the concern of William Berry and company were not owing a sum exceeding four hundred dollars, — that he, Harding, thinking it a little unusual for a Boston man to be wanting their goods at that season of the year, asked him what he was going to do with the goods, and that the defendant answered that he had an order for them and was going to ship them south, — that, in consequence of these representations, he sold said Berry and company hats to the amount of about two hundred and forty-five dollars, and that on the said second day of February, they settled for them by giving Lee, Harding, and Jones their note for the amount at four months, and that the said note had not been paid. On cross examination, the witness further testified, that he never knew or heard of said Moulton or Davidson before, and, hence, that his representations that his name was Moulton had no influence on the mind of the witness, in determining him to give the credit.

On this state of the evidence, the defendant moved the court,

First, that the indictment be quashed, because it sets forth and alleges, that, by means of the representations therein mentioned, the said Lee, Harding, and Jones were induced to give the said William Berry and company credit on the said hats, whereas, in truth and in fact, the said Lee, Harding, and Jones gave Berry and company no credit on said hats, but, that on the delivery thereof, the said Berry and company paid for them by their promissory note payable in four months;

Second, to rule, that, inasmuch as the indictment alleged one of the false representations to be, that the defendant represented William Berry and company as then owing not more than three hundred dollars, and the evidence was that the defendant represented, that they were not then owing over four hundred dollars; — this was a fatal variance as to that particular charge in the indictment;

Third, to rule, that, inasmuch as the said Harding testified, that the defendant's misrepresentation as to his name

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had no influence in determining him to give the defendant credit, that that particular charge in the indictment should be taken from the jury, or that the jury should be instructed to lay it out of the case, for all purposes, except with reference to the question of an intent on the part of the defendant to cheat and defraud.

The court refused to quash the indictment and to rule as above suggested.

Fourth, evidence being offered on the part of the prosecution, tending to show, that the defendant and Berry, in their individual capacities, were owing debts to a larger or smaller amount, both before and after the said second day of February, the defendant objected thereto, as immaterial and irrelevant, but his objection was overruled, and the testimony admitted.

Fifth, the defendant's partner, William Berry, having been examined in chief, as a witness on his behalf, the county attorney, before commencing the cross examination, gave the said Berry notice to produce the account books of the firm of William Berry and company; and the books being accordingly produced by him, the attorney examined them himself for two or three minutes, and then examined the said Berry with relation to two entries over erasures in them, one of which related to the purchase of the said palm leaf hats; and the books were also examined by the jury in relation to the same two entries. The defendant thereupon requested the court to rule, that the county attorney, by so examining the witness with reference to the said books of account, and by so exhibiting them to the jury, had put the said books of account into the case; but the court decided, that the books were only in the case with respect to the two entries on which the witness had been examined, and for the purpose of cross examination as aforesaid.

The court, in conclusion, instructed the jury, with reference to the several pretences set forth in the indictment, that it was not necessary to prove them all as set forth, but only in substance; and that if any of the pretences so proved

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were accompanied by the other circumstances essential to constitute the offence, it would be sufficient to sustain a verdict against the defendant.

The jury rendered a verdict of guilty against the defendant, who thereupon alleged exceptions to the rulings and instructions aforesaid.

Other objections were also taken at the trial, which, on the hearing in this court, were waived.

F. W. Sawyer, for the defendant. 1. The indictment alleges, that the goods were obtained by the defendant, as upon a sale on credit; but the evidence was, that the defendant gave his note for them, payable in four months. The giving of the note was a payment. There is consequently a fatal variance.

2. The indictment alleges, that the defendant represented that Berry and company were not then owing more than three hundred dollars; the proof is of a declaration that Berry and company were not then owing more than four hundred dollars. The question is, whether this is a fatal variance. Allegations of matter of substance may be proved in substance; allegations of matter of essential description must be strictly proved. 1 Greenleaf on Evidence, § 56. In general, allegations of time, place, quantity, quality, and value, are not required to be strictly proved. 1 Greenleaf, § 61. But there are exceptions, where such allegations operate by way of limitation, or description of other matters, in themselves essential to the offence or claim. 1 Greenleaf, § 63. The allegation of the amount of indebtedness, in the indictment, is clearly a limitation and description of a matter, which is essential to constitute the offence, namely, the alleged false representation, and should therefore have been strictly proved. The representation proved is not the same with that alleged.

3. The evidence of Harding having shown that the misrepresentation of the defendant, as to his name, had no influence on the mind of the former, in determining him to give the credit, the court nevertheless allowed such misrep-

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resentation to go to the jury, to have its effect upon the case generally; whereas it should have been laid out of the case altogether, or the jury should have been instructed to disregard it, except with reference to the intent. *Malsen* v. *Fry*, 1 Watts, 433; *Wideler* v. *Banks*, 11 Serg. & R. 134; *Ferguson* v. *Tucker*, 2 Harr. & Gill, 182; *Mercer* v. *Wamersley*, 5 Harr. & Johns. 32; *Stouper* v. *Latchshute*, 2 Watts, 167. The present is a stronger case. Here, there was no evidence, that the false name had any effect in inducing the credit.

4. Evidence of the individual indebtedness of the defendant and Berry was improperly admitted to show the indebtedness of the firm. The representation related to the condition of Berry and company, as copartners; and to show that this was false, it was quite immaterial whether the partners were individually indebted or not. No direct authority to this point has been found. In *Commonwealth* v. *Catlin*, 1 Mass. 8, on a charge of open and gross lewdness, evidence of secret or private lewdness was held to be inadmissible.

5. The ruling of the municipal court with regard to the books raises a very important point of law, which has not yet been decided in this commonwealth; though well settled in some of the other states, in the federal courts, and in England. The rule, as thus established and recognized, is stated in 1 Greenleaf on Evidence, § 563, and in 4 Shepley, 224, together with the authorities on which it is founded. It was adopted and sanctioned in *Withey* v. *Gillespie*, 7 Serg. & R. 34; *Jordan* v. *Wilkins*, 2 Wash. C. C. 482, 484; *Randel* v. *Chesapeake & Del. Can. Co.*, 1 Harrington, 233, 284; *Penobscot Boom Co.* v. *Lamson*, 4 Shepley, 224. According to the rule, as laid down and established by these authorities, (and the case in 7 Serg. & R. 34, is precisely like the present,) the books of a party, when called for by the other side, and produced accordingly, and thereupon used in evidence by the party calling for them, become evidence for both parties. If these authorities are regarded by the court as decisive, the books of the defendant were in the case;

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and he should have had the benefit of all the evidence which they might have contained in his favor.

S. D. Parker, (county attorney,) for the commonwealth.

1. The motion of the defendant, that the indictment should be quashed in the midst of the trial, upon the refusal of which the first exception is founded, was a most extraordinary proceeding. The authority to quash an indictment, though within the discretion of the court, is never exercised, after a plea of not guilty; and, at all events, the motion could never have been allowed on the frivolous ground here suggested. The sale of the goods was no less on a credit, because a note was given payable in four months, than if it had been suffered to remain simply on book account. But, admitting that the giving of a negotiable promissory note operated as a payment, (and this is the extent to which the authorities go,) it does not appear that the note in question was negotiable.

2. The variance, which is the ground of the second objection, is entirely immaterial. It is never necessary to prove all the representations, nor any of them precisely as they are stated, but only in substance.

3. In regard to the third objection; — as the court could not lay the evidence out of the case, or strike out a part of it, or take the fact from the jury, — the request of the defendant was properly refused; but the point was sufficiently embraced in the general instructions, as stated on the record.

4. The evidence of individual indebtedness was rightly admitted. The term "copartners," as used in the indictment, is merely descriptive, and does not refer to a partnership. If the partners, individually, were insolvent, then the partnership could not be safe to trust; and this was the mischief to be guarded against.

5. The refusal of the court to allow the books to be used by the defendant, in the manner he desired, was clearly proper. This case differs from that cited from 7 Serg. & R. 34; in which the party limited his request to a single entry, and was allowed to use the book accordingly. In the present

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case, the defendant did not ask the court to allow the books to be used as evidence to any specified point, but contended that they were evidence as to every thing which they contained. If the court had been asked to allow the books to be used as evidence for a particular purpose, and the request had been refused, the case would have stood upon the same footing with the case cited as above.

Dewey, J. The first objection taken is, that the indictment sets forth "a sale obtained upon a credit;" whereas the evidence shows, that the defendant gave the vendor a promissory note payable in four months from date. Upon this point, it is contended by the defendant, that the giving of such promissory note of hand is a present payment. In one sense it is so. By the judicial decisions of this court, the giving such promissory note is *prima facie* evidence of payment. It is only *prima facie*, however, and may be explained, and its effect as payment controlled, by the circumstances of the case. But in the sense in which a sale upon a credit is set forth in the indictment, the giving of a promissory note payable at a future day is entirely consistent with such allegation. The gist of the allegation is, that the goods were obtained upon a credit given to Davidson and Berry. That the goods and merchandize were thus delivered upon credit is equally true, whether the vendors charged the same in account on a credit of four months, or took the promissory note of the defendants, payable at a like future day, without any security therefor by an indorser, or otherwise. The sale in either case was upon a credit, and upon credit given to the defendant and Berry. This objection is, therefore, not well founded.

2. It was further insisted at the trial, that as the witness Harding, who testified to the alleged false representations, and to the sale of the property to the defendant by reason of such false representations, further testified that the misrepresentations by the defendant as to his name had no influence in determining the witness to sell on credit to the defendant, "that particular charge," to use the language of the bill of

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exceptions "should be taken from the jury or laid out of the case for all purposes, except upon the question of intent to defraud and cheat." If by this request we are to understand nothing more to be asked, than an instruction to the jury, that the misrepresentation as to the name of the defendant was not upon the evidence proved to have been an inducing motive with Harding, to give the credit to the defendant for the payment of the goods, then it was a proper request, which should have been ruled upon, and the law thereon stated, during the progress of the trial; whether in the general charge to the jury, or at an earlier stage, was not material. Whether this was sufficiently noticed in the general instructions to the jury, might require a more particular consideration, if the question of granting a new trial depended upon this exception alone.

3. It was also contended, that inasmuch as one of the allegations in the indictment charged the defendant with representing, that the firm of Berry and company did not owe debts amounting to more than three hundred dollars, whereas the evidence was, that the defendant represented that the firm did not owe more than four hundred dollars, there was such a variance as to be fatal to maintaining the indictment, so far as applied to that charge. Upon this point the general rule may be stated to be, that the pretence proved must correspond with that alleged in the indictment. 2 Stark. Ev. 563. But it is not necessary to prove the allegations of the indictment in every minute particular. The prosecutor must prove the pretence in substance as laid in the indictment. Archb. Cr. Pl. 157. There does not seem to be an entire uniformity in the adjudicated cases upon this point. The rule, as stated in 2 Russell, 1402, is that, upon an indictment for obtaining money by false pretences, such pretences must, at the trial, be proved as laid. The only case cited by Russell is that of *Rex* v. *Plaistow*, 1 Campb. 494. where the indictment alleged that the defendant pretended "that *he* had paid a sum of money into the Bank of England." The evidence was, that the defendant said, "the

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money had been paid into the Bank of England." Lord Ellenborough held this to be a fatal variance, saying that an assertion that money had been paid into the bank was very different from an assertion that it had been paid into the bank by a particular individual.

In *Rex* v. *Parrott*, 2 Maule & Selw. 379, 386, lord Ellenborough seemed to hold, that where a party is charged with obtaining goods by false pretences, "the indictment should state the precise charge by distinct averments." On the other hand, in *The People* v. *Herrick*, 13 Wend. 87, the false pretence, as stated in the indictment, was, that the defendant declared that he had the sum of three hundred dollars in the hands of one John W. Squier; that Squier was then absent, but would return in three or four days; and that as soon as he returned, he could obtain from him the said sum of three hundred dollars, and would pay the party to whom he made these pretences the sum of eighty-five dollars; and that by means of such false pretences he obtained the signature of such individual to a note, as an indorser for him for that amount. The evidence was, that the defendant said he had one hundred and fifty dollars in the hands of Squier, and the counsel for the defendant contended that there was a fatal variance. Savage, C. J., in giving the opinion of the court, says, there is no doubt of the general correctness of the proposition that the fact must be proved substantially as alleged. But the court further held, that the indictment having alleged also that the defendant had no money in the hands of Squier, and this being shown by the facts in the case, a conviction might be sustained, although the false pretence was erroneously stated. In the present case, it seems to us, that the effect of the variance must depend upon the nature of the other allegations in the indictment, and the proof introduced to show that such other representations were the inducements that operated upon the mind of Harding, and caused him to sell his goods to the defendant on a credit. If the allegation that the firm did not owe more than three hundred dollars was the material

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allegation, or, in other words, the substantial false pretence, we should be of opinion, that proof of a representation by the defendant that the firm owed only four hundred dollars, would be a fatal variance. On the other hand, it not being necessary to prove all the false pretences to have been made that are set out in an indictment, but only such as were material in inducing the credit, this indictment may be maintained upon proof of the other facts alleged, if in the opinion of the jury they constituted the pretences that induced the sale and delivery of the property to the defendant. In looking at this indictment, we perceive that it alleges that the defendant represented to Harding that Berry had put into the copartnership the sum of one thousand dollars, which they *then* had invested in the partnership business, and that the copartnership was worth property of the value of fifteen hundred dollars. The indictment then alleges that Berry never did invest or put one thousand dollars into the capital of the copartnership, and never put in or invested any capital in the business of said copartnership, but was a poor person, and the said copartners were not worth fifteen hundred dollars, but were poor and insolvent persons, and unable to pay their debts.

It was quite competent for the government to submit this case to the jury upon proof of the other allegations, independent of this as to which the variance exists, and if the other allegations were established, and if they were shown to be false pretences, and that by means of those pretences the credit for the goods was obtained, the jury would be well authorized to find the defendant guilty, although there was no proof that he made the further alleged pretence that the firm did not owe three hundred dollars. The proper course, however, would be, in such case, for the presiding judge to instruct the jury, that the alleged false pretence as to the indebtedness of the copartnership not exceeding three hundred dollars was not proved, and that a conviction of the defendant could only be proper upon proof of the other false pretences and showing that they induced the sale of the goods on credit

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It is supposed by the counsel for the government, that the law upon this point was sufficiently and properly presented under the general instructions given by the presiding judge in the charge to the jury; that it was correctly stated to the jury, that in such cases it is not necessary to prove all the allegations set forth, but if the allegations are substantially proved, and the pretences proved are shown to be accompanied with all the other circumstances required to constitute the offence charged, it would authorize a verdict against the defendant. This instruction was correct, but it leaves the point of variance in the particular matter which is now under consideration unnoticed, and its effect not judicially declared.

4. Another point, of more general bearing and importance, is the question raised upon the trial as to the rule of law, where one party gives notice to the opposite party to produce at the trial his account books, and upon their production under such call the party calling for them inspects the books and introduces them to the jury, so far as to cross examine a witness as to two entries therein, and the books are examined by the jury in relation to those entries, — whether the books are not thereby put into the case generally, and not merely as to the two entries made the subject of examination by the party calling for the books.

The English rule seems to be, that if the party calling for the books inspects them so far as to become acquainted with their contents, they are thereby made competent evidence, and may be used by both parties. 1 Gr. Ev. § 563. In the case of *Calvert* v. *Flower*, 7 C. & P. 386, the rule was applied in the case of an account book, where the party calling for it had taken the book and turned over several pages, it being held, that by so doing he had made the book evidence in the case. It is, however, said by Mr. Greenleaf, in his treatise on evidence, that in the American courts the law is not entirely settled upon this point. In the case of *Penobscot Boom Corp.* v. *Lamson*, 4 Shepley, 224, and in that of *Randel* v. *Ches. & Del. Can. Co.*, 1 Harrington, 233, the decision was in accordance with the English rule.

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In New York the English rule was questioned by Spencer, J., in the case of *Kenny* v. *Clarkson*, 1 Johns. 385, 395, and by Thompson, J., in the case of *Laurence* v. *Van Horne*, 1 Caines, 276, 286.

In *Withers* v. *Gillespy*, 7 S. & R. 10, it was held, "where books are produced on notice and entries are read in evidence by the party calling for them, the party producing them may read other entries necessarily connected with the former entries." The only conflict in the cases, or real doubt that seems to have arisen in the reported cases, is, whether the mere act of inspecting and perusing the books by the party calling for them makes them evidence.

Merely calling for the books, although in answer to such call they are produced, will not make them evidence. It would not by the English rule, as stated 1 Phill. Ev. 440, where it is said, if one party calls for books in the possession of another, but declines to use them when produced, the mere calling for them will not make them evidence; but if the party calling for them inspects them, he thereby does make them evidence, although he does not introduce them. The result of the examination of the cases seems to be, 1. That all the authorities agree that mere calling for the books is not enough to make them evidence; 2. That whether calling for the books of the opposite party and inspecting them, and doing nothing more, makes the book evidence, is a *mooted point;* 3. That the books, when produced upon notice, if inspected by the party calling for them, and actually used as evidence by him, are thereby made evidence for the other party. 3 Phill. Ev. (4th Am. Ed.) 1191.

The present case falls clearly within the last class, and the book of accounts was therefore made competent evidence for both parties. We do not think its admissibility was to be restricted to the two items selected by the party introducing it. But as to every thing bearing upon the issue before the jury, that was duly entered upon the book, it might be used by both parties. All irrelevant matter would of course be properly excluded, and this would embrace all foreign matter

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entered therein not properly composing any portion of a book of accounts.

The use of the book of accounts as evidence was too much restricted on the trial of the present case, and the exceptions taken to the ruling on this point are sustained.

5. The remaining question is that arising upon the admission of evidence of the individual indebtedness of the defendant, and also of Berry, the partner. The objection taken to the competency of this evidence was, that the false pretence set forth in the indictment was confined to the solvency and pecuniary ability of the firm of Berry and company, and that such solvency and pecuniary ability might well exist as to the firm, although the members of that firm might individually be insolvent as respects their private creditors. This objection seems to us to be well taken. The inquiry ought in strictness to be confined to the partnership debts and partnership assets.

New trial ordered.

COMMONWEALTH *vs.* ELIZUR WRIGHT.

It is libellous, to publish of one, in his capacity of a juror, that he agreed with another juror, to stake the decision of the amount of damages, to be given in a cause then under their consideration, upon a game of draughts.

It is a general rule of pleading in civil as well as in criminal cases, that, where a charge is brought against a defendant, arising out of the publication of a written instrument, the instrument itself must be set out in the writ or indictment.

An indictment for a libel must not only contain, but it must also profess to set out, the very words of which the alleged libel is composed, that is to say, a transcript of the libellous publication, or of that part of it, which is the subject of the indictment.

Marks of quotation, used in an indictment for a libel, to distinguish the libellous matter, are not sufficient to indicate that the words thus designated are the very words of the alleged libel.

The words, "according to the purport and effect, and in substance," in an indictment for a libel, do not import that the very words are set out.

The word "tenor," imports an exact copy, and that it is set out in words and figures.

An indictment for a libel alleged, that the defendant published, &c., an unlawful and malicious libel, *according to the purport and effect and in substance*, as follows — the words between *libel* and *as follows* cannot be rejected as surplusage.

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The defendant, who was the editor and one of the publishers of a daily newspaper, called the *Daily Chronotype*, published in the city of Boston, was indicted, tried, and convicted in the municipal court of the said city, for a libel on one Moses Clark, who, at the time of the publication complained of, was serving as a traverse juror in the court of common pleas then sitting in said city.

The indictment was as follows:

The jurors, &c., present, that Elizur Wright, of, &c., being a person regardless of the integrity, purity, and impartiality, which the citizens of this commonwealth, when summoned to serve and serving as jurors in any of the courts of this commonwealth for the administration of justice between party and party, ought to possess and sustain, and unlawfully and maliciously devising and intending to traduce, vilify, and bring into contempt and detestation one Moses Clark, of Boston, aforesaid, who was on the day hereinafter mentioned and for divers days previous had been a traverse juror duly summoned, sworn, and empanelled, at said Boston, to serve, and did on the day hereinafter next mentioned and on divers previous days duly attend and serve as such traverse juror in the court of common pleas for the county of Suffolk, which was begun and holden at Boston on the first Tuesday in April, in the year of our Lord eighteen hundred and forty-seven, and was thence continued by adjournment from day to day, and holden on the day hereinafter next mentioned, in which said court, on the seventh day of May instant, the said Moses Clark, with eleven other jurors, composing the first traverse jury, after being sworn and empanelled according to law to try the case, did return a verdict in an action wherein one Michael Tubbs was plaintiff and one Francis Tukey was defendant, in favor of the said Tubbs, for the sum of three hundred and four dollars and fifty-eight cents damages, and also unlawfully and maliciously intending to insinuate and cause it to be believed, that the said Moses Clark, with another of the said traverse jurors, when considering of the said verdict, in the action

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aforesaid, instead of deciding therein according to their duty and to the law and the evidence given to them, as the said traverse jurors were sworn and obliged to do by law, unlawfully, scandalously, and corruptly agreed to decide and did decide the amount of damages which they should render in their said verdict in the action aforesaid by a game of draughts, on the fourteenth day of May, in the year last aforesaid, unlawfully, deliberately, and maliciously did compose, print, and publish in a certain newspaper published in Boston, called the Daily Chronotype, of and concerning the said Moses Clark, and of and concerning his discharge of his said duty as such juror sworn and empanelled as aforesaid, an unlawful and malicious libel, according to the purport and effect, and, in substance, among other things, as follows, that is to say,

"It is said that his" (meaning the said Clark's) "marking against Tukey," (meaning the defendant in the said action) "from which he" (meaning the said Clark) "declared with emphasis he would not budge, was four hundred and ninety-nine dollars and ninety-nine cents, but he did budge from it for this reason" (meaning that the said Clark in considering of the said verdict had declared to the other jurors that he would not consent to a verdict for a less sum than four hundred and ninety-nine dollars and ninety-nine cents, but that he afterwards did consent to a less sum for the reason given in the next sentence of the said unlawful and malicious libel).

"He" (meaning the said Clark) "agreed afterwards with one other juryman" (meaning one other of said jurors sworn and empanelled in said case) "who had marked differently, to stake the decision upon a game of draughts with him" (meaning the said other juryman) — (meaning that the said Clark unlawfully, scandalously, and corruptly agreed with another of the said traverse jurors sworn and empanelled as aforesaid, who differed from said Clark in opinion as to the proper amount of damages to be rendered in the said verdict, to stake the decision of the amount thereof upon a game of draughts.)

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"It was so staked and the game going against Clark he was obliged to concur with a lower marking" (meaning that the said Clark and another of the said traverse jurors, while considering of their verdict in the said action, played a game of draughts for the unlawful, scandalous, and corrupt purpose of deciding thereby what amount they should return in the said action, and that the said Clark having lost the said game accordingly and unlawfully, scandalously, and corruptly concurred in a verdict so decided).

"After the matter was arranged" (meaning after the aforesaid unlawful, scandalous, and corrupt agreement charged as aforesaid) "in a trial which decided nothing, he" (meaning the said Clark) "marked down his one cent" (meaning that the said Clark voted for a verdict of one cent damages in the said action) "where in the opinion of the community generally we believe the verdict ought to have been" (meaning that the said Clark originally voted for a verdict in the said action for a sum as damages greatly disproportionate to the justice and merits of the said action and afterwards by an unlawful, scandalous, and corrupt agreement with another juror voted for one cent damages and so trifled and sported with his duty as a juror and was guilty of a misdemeanor), to the great injury, scandal, and disgrace of the said Moses Clark, and against the peace, &c.

The defendant moved in arrest of judgment:

First, because the publication set forth in the indictment does not contain any libellous or indictable matter;

Second, because the publication does not contain any such libel as is charged in the indictment;

Third, because the indictment does not profess to set forth the very words or tenor of the alleged libel, but only the purport, effect, and substance thereof; and,

Fourth, because the indictment is, in other respects, uncertain, informal, and insufficient in law.

The presiding judge of the municipal court overruled this motion, and the defendant thereupon brought his case to this court by exceptions.

The case was argued, on the part of the defendant, by

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R. Hildreth, as to the first and second grounds of the motion in arrest, and by *H. E. Smith*, as to the third.

Hildreth. The party alleged to be libelled was at the time serving as a juror, and the publication referred to him as such and not in his private character. The defendant was the publisher of a newspaper. There is nothing, therefore, in the case, which should induce the court to disregard technical objections. The prosecutor was *quasi* a public man; the defendant was in the performance of a duty to the public; and, in this country, it is not held to be an aggravation of a libellous publication, that the subject of it is a public character. Newspapers are no longer considered as nuisances; but as a necessary article of life; the daily bread of the public. Editors are often obliged to act upon slight evidence; to get up their publications with great haste; and they are surrounded by exciting causes. In the performance of their duty to the public, they are therefore entitled to some indulgence; and the law ought not to be so strict with reference to their publications, as in regard to those which have no public purpose in view. Prosecutions for libel against editors ought not to be encouraged.

1. The publication complained of is not a libel. What is a libel? It is something published, which tends to blacken or defame a man's character, and to make him an object of hatred or contempt; and, in order to do this, the publication must contain a serious and substantial charge, and not merely one of a light and frivolous description. There is nothing in this publication, which can by any possibility be deemed libellous, unless it be that part of it, which charges the prosecutor with entering into an agreement with one of his fellows, to decide upon their verdict by a game of chance. But, by the agreement, as stated, the two jurors only undertook to settle *the amount of damages*, and not *the verdict*, by means of a game of chance. If it had been the latter, the statement might have been libellous. The jury had agreed upon a verdict for the plaintiff, and the only point then before them was as to the amount of damages. They had to decide,

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whether they should agree upon the amount, or disagree and be discharged from giving a verdict.

2. The publication was not what it is set forth to be in the indictment. The latter alleges, that the defendant charged the prosecutor with acting corruptly. But the charge itself does not import any thing of a corrupt nature. The conduct of the prosecutor, as stated in the publication, might be improper or even unlawful, but it was not in any sense corrupt. If, then, the indictment allege a charge of corruption, and the publication, as stated, import no such charge, this is a repugnant and defective statement, and a sufficient ground for arresting the judgment.

Smith. The *third* ground of exception is, that the indictment does not profess to set forth the very words or tenor of the alleged libel, but only its purport, effect, and substance. The indictment professes to set out only a part of the libel, namely, the substance of it. The terms employed, — "according to the purport and effect, and in substance, among other things, as follows, that is to say," — indicate only that the substance of the libel is set out. The terms "purport and effect" do not add to, or mean any thing more than, the word "substance," which is used in connection with them. *Purport* and *effect* import *substance.* 1 Chitty C. L. 234; Archbold C. P. 44; Wharton Am. Crim. Law, 83, 84. We contend, 1st, that the indictment should set out the libel in the very words of which it is alleged to be composed; 2, that it should profess to do so; and, 3, that it should set out the whole of those words.

1. The language of a libel must be set out in the indictment in the very words of the publication. Archbold C. P. 42; Wharton Am. C. L. 83; *Zenobio* v. *Axtell*, 6 T. R. 63 (as to the mode of setting out a libel published in a foreign language); *State* v. *Stevens*, Wright, (Ohio,) 73; *State* v. *Gustins*, 2 Southard, 744; *Commonwealth* v. *Sweeney*, 10 S. & R. 173; *Wright* v. *Clements*, 3 Barn. & Ald. 503; *King* v. *Beer*, 12 Mod. 219; *State* v. *Parker*, D. Chipman, 298; Starkie on Slander, 323.

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2. The very words must not only be set out, but the indictment must profess to set them out. 1 Starkie on Slander, 323; 1 Chitty C. L. 234; Wharton Am. Crim. L. 83; 3 B. & A. 506. For this purpose, certain forms of expression, indicating that the words are so set out, must be used, as, for example, "of the tenor following," — "as follows," — "containing," — "in the words and figures following," &c.

3. These rules ought to be applied with more strictness, where the indictment does not profess to set out the whole of the publication, but only that part of it, which the prosecuting officer considers as libellous. He is doubtless at liberty to select and set out in the indictment those portions which he charges as libellous, without inserting the residue of the publication. But, if, in addition to this, he were allowed to set out only a part, that is to say, the substance, of those portions, the defendant would be under great difficulty in knowing what he was charged with.

It is exceedingly clear, from the English authorities, and from cases decided in other states, that the indictment must profess to set out the alleged libellous matter, and must set it out in the very words. It was argued in the municipal court, that the words, "according to the purport and effect, and, in substance, among other things," might be rejected as surplusage, and then the indictment would profess to set out, and would in fact set out the very words. But this would be to make a new indictment. In *Wright* v. *Clements*, 3 Barn. & Ald. 503, Abbott, C. J., says, the words "in substance" give a different meaning.

It seemed to be admitted, on the argument in the court below, that the indictment was bad, according to the English authorities. But it was said, that a practice had become established, in this commonwealth, which was sanctioned by the forms in Davis's Precedents, 125, 154, to state a libel according to the substance and effect. Mr. Davis refers to East P. C. 975, as his authority; but the rule there laid down, which was with reference to indictments for forgery, is directly the other way. In *Commonwealth* v. *Houghton*

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8 Mass. 107, Mr. Davis referred to his own practice as authority, but the court disregarded it; and in *Moore* v. *Commonwealth*, 6 Met. 243, the authority of one of his precedents was directly set aside.

The case of the *Commonwealth* v. *Parmenter*, 5 Pick. 279, was also relied on as sanctioning the doctrine, contended for on the other side. In this case, the court say, that as the statement of the note alleged to be forged is according to the purport and effect, there is no material variance between *promised* and *promise*. But the point now presented was not raised, and that case therefore cannot be considered as decisive of the present.

Another point, which was taken in the court below, was, that marks of quotation performed the office of a recital, — upon what authority was not stated; but unless inverted commas perform a higher function than that of a recital, the argument is of no avail.

It was argued, also, that the practice in this commonwealth, which had prevailed for a long time, to describe written instruments, according to their purport and effect and in substance, ought not now to be questioned. This argument is answered by the remarks of Chipman, C. J., in the case of *State* v. *Parker*, 1 D. Chipman, 298, which was an indictment for uttering and giving in payment a counterfeit bank note; the instrument was not set out in words and figures; this being objected to, the form was admitted to be bad, according to the common law; but it was attempted to be sustained on the ground, "that indictments for forgery had been so drawn in Vermont, for more than thirty years, and that not one had been quashed, or held bad on demurrer for this exception;" but the court, notwithstanding the long usage, which was admitted to have prevailed, though not universally, sustained the exception, and adjudged the indictment to be bad.

In order to sustain this indictment, the court must decide one of two things, namely: either that it is not necessary, in an indictment for a libel, to set out the words, but only

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2. The very words must not only be set out, but the indictment must profess to set them out. 1 Starkie on Slander, 323; 1 Chitty C. L. 234; Wharton Am. Crim. L. 83; 3 B. & A. 506. For this purpose, certain forms of expression, indicating that the words are so set out, must be used, as, for example, "of the tenor following," — "as follows," — "containing," — "in the words and figures following," &c.

3. These rules ought to be applied with more strictness, where the indictment does not profess to set out the whole of the publication, but only that part of it, which the prosecuting officer considers as libellous. He is doubtless at liberty to select and set out in the indictment those portions which he charges as libellous, without inserting the residue of the publication. But, if, in addition to this, he were allowed to set out only a part, that is to say, the substance, of those portions, the defendant would be under great difficulty in knowing what he was charged with.

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the substance; or that the terms *purport* and *effect* import that the very words are set out. If the latter, the court ought also, at the same time, to decide that the word *tenor* in a recital imports that the *substance* only is given; otherwise, all distinctions will be confounded.

In conclusion, we contend that it is clear, both upon reason and authority, that in an indictment for a libel the very words of the alleged libel must be set out, — that the indictment must profess to set them out, — and that certain technical words, which have acquired a settled meaning, must be used to signify whether the very words are set out, or whether their substance only is contained in the indictment. The contrary practice has not prevailed long enough, or been so extensive, as to have become the common law of this commonwealth.

S. D. Parker, (county attorney,) for the commonwealth.

It is not true, as was urged by one of the counsel for the defendant, that prosecutions for libel ought to be discouraged. The reputation of the citizens is as much entitled to the protection of the law as their persons. The punishing of libels by law is no doubt the frequent cause of preventing bloodshed, which would be likely, here as well as elsewhere, to ensue, if the party injured by the publication of a libel had no means of redress by resorting to the law. It was lately argued by counsel in one of the inland counties,* that, in this commonwealth, libels were not legally punishable; and so argued the defendant, in the present case, who had no counsel, on his trial in the municipal court. The decision in the case alluded to has not yet been pronounced, but there can be no reasonable ground for doubting what it will be. Libels are undoubtedly punishable by law in this commonwealth, and so are likely to remain; at least, until the law is changed by the legislature. Editors are not licensed slanderers; they as well as others are amenable to criminal prosecution, if what they publish is injurious to the reputation of the citizens;

* Allusion is here made to the case of the *Commonwealth* v. *Chapman* (13 Met.), in Franklin, decided at Northampton, September term, 1848.

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and it is to be hoped, that they will become more sensible of the duties incumbent upon them, in this respect, than the counsel of the defendant seems to be. Instead of being less on their guard than others, as suggested by the counsel, editors should be much more so; inasmuch as newspapers have a wider circulation than libellous productions in any other form. Haste is no justification; and, if it were, there is no pretence for it in the present case; the article complained of was the last of a series, and was the result of deliberation.

In the argument for the defendant, the authority of the late solicitor-general Davis, a most eminent lawyer, and an extremely able and successful prosecuting officer, was called in question. His Precedents, however, are exceedingly valuable; they give the law as it existed when they were compiled; and, if the law has since changed, it is not his fault. The revision of the statutes introduced many changes in the criminal law, and some corresponding alterations became necessary in the forms of indictments. But two cases, however, have been referred to, in which Mr. Davis's forms have been found to be defective and overruled; one of which is the case of *Moore* v. *Commonwealth*, 6 Met. 243, which was an indictment for adultery; and the other that of the *Commonwealth* v. *Houghton*, 8 Mass. 107, which was an indictment against the defendant for having counterfeit bills in his possession, with intent to pass the same as genuine. The indictment, in the present case, was copied from No. 220. If the objection taken is valid this precedent must also be overruled. The ground, upon which the form of pleading objected to was adopted by Mr. Davis, is stated by him, in a note to his first precedent for forgery, (p. 125, n. 1,) in which the forged instrument is described as "of the purport and effect following;" and, in a note appended to this passage, he says: "This is the most proper allegation, as to the mode of describing the forged instrument. It is neither necessary nor advisable to allege it in the 'tenor following.' See 2 East P. C. 975, §§ 53, 54." The passage referred to in East is as follows: "It is essentially necessary, to an indictment for forgery, that the instrument alleged to be

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forged should be set forth in words and figures; though there be no technical form of words, for expressing that it is so set forth." In a note to the same words in another indictment, also for forgery, Mr. Davis remarks: "This mode of alleging the purport of the instrument is equally valid, and more advisable than to allege it in the 'tenor,' in which case, the slightest mistake is fatal." He probably thought that the minute verbal accuracy required in the proof, where the word "tenor" was used, was not equally necessary where the statement was introduced by the words "purport and effect," or other equivalent words; although it was necessary, that the alleged forged instrument should be set forth in words and figures; and, that, on the authority of the doctrine stated by East, the risk attending the use of the word "tenor" might be avoided; because, although the instrument must indeed be set out in words and figures, yet no technical words were necessary to convey the idea that it was so set forth.

The *first* objection, urged by the defendant's counsel, is matter of substance; the *second* relates to a supposed variance; the *third* is a question of mere form.

1. It is first said, that the publication is not libellous. But it is clear, from the language, that it imports a charge of corruption in the prosecutor, in deciding the case before him, as a juror, upon or by reason of an unworthy motive; and such a charge is clearly libellous, according to the most approved definitions of the offence of libel. That given by Mr. Hamilton, in his argument in the case of *The People* v. *Croswell*, 3 Johns. C. 354, is the briefest and most comprehensive: "A libel is a censorious or ridiculing writing, picture, or sign, made with a mischievous and malicious intent towards government, magistrates, or individuals." In *Clark* v. *Binney*, 2 Pick. 113, Lincoln, J., in stating the opinion of the court, refers with strong approbation to the definition of libel given by Parsons, C. J., in the case of *Commonwealth* v. *Clapp*, 4 Mass. 168: "It is a malicious publication expressed either in printing or writing, or by signs, or pictures, tending either to blacken the memory of one dead, or the

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reputation of one who is alive, and expose him to public hatred, contempt, or ridicule."

2. The second objection is, that there is a variance between the publication, and the averments in the indictment; that the publication itself is innocent, though the averments make it criminal. Questions of variance are mixed questions of law and fact, to be decided by the jury under the instruction of the court. The motion now is, not to set aside the verdict, but to arrest the judgment. The jury have found the facts as set out by means of the innuendoes; and no question of variance can arise, but upon a motion for a new trial, on the ground of a misdirection. No question is made but upon the record alone. The answer to this second objection is, that the publication is as libellous, as the averments in the indictment make it; but, if it were otherwise, the jury in the court below have already passed upon it, under the instruction of the court, and there is no motion to set aside the verdict, on the ground of misdirection. The publication must now be taken to be what the indictment says it is.

3. The third objection is one of mere form. The exception declares that the indictment is bad, because it does more than it professes to do; and the judgment is asked to be arrested, because the indictment does not profess to do what it in fact does.* Is the indictment defective in point of form? The motion is, that the judgment be arrested, because the indictment only professes to set out the substance of the libel. The indictment does, in fact, set out the libel in the

* Before proceeding to consider this objection, Mr. Parker observed, that he had drawn all the indictments, amounting to several thousands in number, which had been returned by the grand juries for the county of Suffolk, since he had been appointed to office, with the single exception of the indictment in this case. The complaint, in this instance, was made to the grand jury, just at the close of their business for the term, and the indictment was prepared by the prosecutor's counsel, an eminent member of the bar in this county. Being drawn according to the precedent in Davis's Precedents, No. 220, p. 161, which had been before followed by him in very many important cases, without being objected to, he had adopted the indictment, and presented it to the grand jury as his own.

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words of the publication. But this is not the exception. The defect complained of is, that the indictment does not profess to set out the words. It does, however, profess to set out the very words. That this is the case, is apparent, *first*, from the marks of quotation; *second*, from the innuendoes; and, *third*, from the use of the word "purport."

I. The marks of quotation show, that the publication is set out in the very words. All writings conform to certain rules; and the words, figures, and marks, of which they are composed, are read by the eye. Punctuation is a part of language, if any thing which does not consist of words can be so, because it affects, and, indeed, sometimes fixes, the meaning of a sentence. Thus, for example, in this phrase, — *the Lord is gracious never willing the destruction of men*, — the sense is one way, if the comma is placed before, and quite different, if placed after, the word *never*. All the marks of punctuation thus are or may be signs of ideas, and consequently are a part of the written language. Whatever indicates meaning conveys ideas to the mind. Marks of quotation, which are among the signs used in punctuation, and therefore indicative of ideas, denote that the words thus distinguished are quoted, that is, that the language *professes*, which is all that is wanted in this case, to be taken from some other source. They profess to mark language, which is transferred, *ipsissimis verbis*, from something else. *Purport* is that which is apparent to every eye. When it is said, that such is the purport of a thing, we understand that so it appears to every eye to be. In like manner, inverted commas indicate to every eye that what they contain is quoted. In the case of *Wright* v. *Clements*, 3 Barn. & Ald. 503, decided in 1820, and in that of *Commonwealth* v. *Sweeny*, 10 Serg. & R. 173, decided in 1823, which are the principal authorities relied on by the defendant, the word *substance* only is used. But, in the present, the word *purport* also is employed; and there is a distinction between substance and purport. The latter addresses itself partly to the sight; the former to the mind only. Purport denotes what is apparent to

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every eye. Marks of quotation are apparent to every eye, and indicate that the words so distinguished are taken from some other source. When, therefore, the statement of the libel is introduced by the word *purport*, and accompanied with marks of quotation, if it be true, as laid down by East, that no technical form of words is necessary to show that the instrument is set out in words and figures, — how can it be said, that this indictment does not profess to set out the very words of the libel?

II. The innuendoes, quoting the words of the publication, and then explaining them, show that the very words are given; and that the language and not the substance is intended to be given. This is the very purpose of an innuendo; the language being inserted, as it exists, and then explained by the innuendo in its legal sense.

III. The word *purport* shows, that the indictment undertakes to set out the very words. But it is said, that *tenor* is the necessary word; and if that were only in the indictment, it would be sufficient. The earliest case, which is referred to as authority for this nicety in the use of language, is that of *The King* v. *Beare*, 1 Ld. Raym. 414; reported also in Carthew, 407; Holt, 422; and 3 Salkeld, 226. In that case, it was held, that tenor imports an exact copy, on the authority, in part, of the Register of Writs, 169 (a); in which, 169 (b), the word *tenor* is used as synonymous with *transcriptum*. The position, taken on the part of the commonwealth, is, hat tenor and purport mean the same thing. There are three sources, from which the meaning of words and phrases, in legal terminology, may be ascertained, — lexicographers, text writers, and judicial decisions.

Among lexicographers, it will be sufficient to refer to two only. The word *tenor* is both Latin and English. In the former language, it is thus defined by Facciolati: — "accent, — tone; — among jurisconsults, *tenor legis* is the meaning or purport of a law." Webster defines it as — "sense contained; purport; substance; general course or drift." From the lexicographers, therefore, it appears, that tenor and purport are equivalent terms.

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Among the text writers, Chitty defines purport to be "the substance of an instrument, as it appears to every eye." 1 Chitty C. L. 214. If this be true, purport means the same as tenor. Archbold says, that purport is that which appears on the face. Archbold C. P. 20. The same definition is given in 2 East P. C. 980. Can tenor mean any thing more? From the text writers, therefore, as well as the lexicographers, it is clear, that purport is as effectual as tenor.

Judicial decisions may also be resorted to for the use and meaning of words. In *Commonwealth* v. *Parmenter*, 5 Pick. 279, which was an indictment for forgery of a promissory note, described as of "the purport and effect following," the court held, that, as the note was set out according to its purport and effect, and not according to its tenor, the variance between *promised* and *promise* was not material. If the word tenor was not material in this case, it cannot be so in the case at bar. In *Nye* v. *Otis*, 8 Mass. 122, which was an action of slander, setting out the substance was held sufficient. In *Commonwealth* v. *Carey*, 2 Pick. 47, which was an indictment for uttering a counterfeit bank note, the instrument was described as of the "following purport and effect;" in *Commonwealth* v. *Ward*, 2 Mass. 397, the defendant was indicted for forging and uttering a promissory note, "purporting" to be the note of one J. E.; and in *Commonwealth* v. *Boynton*, 2 Mass. 77, the indictment was for uttering, &c., as true, &c., "in substance and of the purport and effect following;" and, in none of these cases, was any objection made that the word tenor was not used, or that the statement of the instrument was insufficient. In *Downing* v. *State of Missouri*, 4 Miss. 573, it was held, that, when an indictment undertakes to describe an instrument according to its purport, it must describe it in the words of which it is composed, that is, as it exists, and not merely according to its legal effect. In that case, which was an indictment for circulating a note contrary to law, the note was described as payable to the *holder;* the note offered in evidence was payable to *bearer;* the court considered this as a fatal

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variance, although it was admitted that the legal effect of the note, as it was set out, and as it was proved, was the same.

Upon these grounds, it seems clear, that the word purport is sufficient, and that the word tenor is not necessary. Some duties must be supposed to have been discharged by the court, before which the trial took place; and if there had been a variance, it would have been seen and pointed out, and would have been fatal. Something also may properly be presumed after a verdict. In 2 Dane's Abridgment, 587, it is said, that "there are two ways of describing a libel, one by the words, and the other by the sense."

Hildreth, in reply. The attorney for the commonwealth has not taken any notice of the distinction between deciding *a verdict*, and deciding the *amount of damages* merely, by a game of chance or skill. What was said by the defendant does not charge corruption; it imports an indecorum, perhaps, but nothing immoral.

The second ground of exception is treated by the attorney as a variance; but it is not of that character; it is an incongruity apparent on the record. As to the third ground of exception, the only case cited for the commonwealth, in opposition to the numerous English and American cases, relied upon by the defendant, is that of *Downing* v. *State of Missouri*, 4 Miss. 575; upon the authority of which, the court will hardly be inclined to set aside the former. Marks of quotation do not always indicate the very words. There are many passages in Bancroft's History, for example, in which, although distinguished by marks of quotation, many of the words of the authors referred to are omitted. The only case cited from the reports of this court, which is at all applicable, is that of *Commonwealth* v. *Parmenter*, 5 Pick. 279. But in that case, the point now in issue was not made. Besides, there is a distinction between forgery and libel. In the latter, the offence consists in the very words; which, consequently, the defendant is entitled to have set out to him.

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Forbes, J. The first objection is, that the indictment on which the defendant is convicted, does not contain any libellous, or indictable matter.

We think that this objection cannot be sustained. The matter contained in this publication is, clearly, libellous. The tendency of the publication was to degrade the prosecutor in the esteem and opinion of the world; it impeached his integrity as a juror, and must, if the charge which it contains were true, make him an object of distrust and contempt among men. It was open to the defendant, in justification, to prove the truth of the charge, and that it was published with good motives, and for justifiable ends. But assuming, as we must do, at this stage of the case, that the publication was false and malicious, the record discloses, not merely an indictable offence, but an offence which the peace and well-being of society require to be repressed by exemplary punishment.

It was, however, contended in the argument for the defendant, that as the transaction set forth in the publication took place after the jury had agreed to return a verdict for the plaintiff, and as it related merely to the manner of assessing the damages, the publication ought not to be held to be libellous. The counsel for the defendant seemed to concede that to charge a juror with having returned a verdict in the manner stated in the publication would be libellous, but he insisted upon a distinction between a charge which related to the finding of a verdict, and a charge which related to the manner of assessing the damages. We do not perceive that any such distinction can exist. There was but one issue, it is true, and perhaps the amount of damages is not technically a part of the issue, but an agreement to return a verdict for the plaintiff was not a discharge of their whole duty by the jury. Their duty was twofold; they were first to find the issue, and then to assess the damages. The oath of a juror is designed to protect all those interests upon which it is competent for a jury to decide The obligation of the oath is not divisible; it cannot be restricted to a particular subject of inquiry, in the manner supposed by this objection.

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Another objection to the indictment is, that it does not profess to set forth the very words or tenor of the alleged libel, but only the purport, effect, and substance thereof.

It is a general rule of pleading, in civil as well as in criminal cases, that when a charge is brought against a defendant arising out of the publication of a written instrument, the instrument itself must be set out in the writ or indictment. *Wright* v. *Clements*, 3 Barn. & Ald. 508. The court are of opinion that this rule is applicable to the present case, and that it is essential to the validity of the indictment, that it should set forth the words of the libel. The correctness and applicability of the rule were not denied on the part of the government, but it was insisted that in drawing this indictment, the rule had been substantially complied with. Upon this part of the case, two questions were discussed at the bar; first, whether it is necessary that the indictment should profess to set out the very words of the publication; secondly, whether the word *purport* and the marks of quotation used in the indictment do import that the very words of the publication are set forth therein.

The objection was said to be merely technical, and the court were invited to disregard it, especially as it was admitted that the words of the publication are recited correctly in this indictment. But whatever the character of the rule may be, if well established, it is clearly the duty of the court to enforce it, and the defendant may as effectually avail himself of this, as of a more meritorious defence.

The strictness required in criminal pleading has been occasionally the subject of criticism and complaint; with this the court have nothing to do: they are bound to administer the law as they find it. If this strictness has a tendency to impede or to thwart the course of justice in criminal proceedings, it is the province of the legislature, and not of the court, to amend the law.

Upon a comparison of the authorities cited at the argument, the court are satisfied, that (with one or two exceptions having no relation to the present case) the indictment

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must not only contain, but it must also profess to set out, a transcript of that part of the libel upon which the pleader relies. The authorities upon this point are somewhat numerous: the English and some of the American cases are referred to 1 Chitty C. L. 238, and note.

The counsel for the government contended, that for a series of years the practice in this commonwealth had been different, and that this practice is warranted by the authority of the late solicitor-general Davis (Precedents of Indictments, 125, n. 1,) and the case of *Commonwealth* v. *Parmenter*, 5 Pick. 279.

The note in Davis's Precedents does not appear to be supported by the authority to which he refers; and the case of *Commonwealth* v. *Parmenter* was evidently decided without much consideration; the correctness of the practice, it is true, seems to have been taken for granted, but the precise question here raised does not appear to have been suggested to the court, and the verdict in that case could not have been sustained for other reasons, which were assigned and relied upon by the court, in setting the verdict aside.

Under these circumstances, we think that that case ought not to control the uniform current of the English decisions, supported by respectable American authorities.

It was further contended, that it did sufficiently appear on the face of this indictment, that the words of the libel were set forth, inasmuch as they were included between marks of quotation. We have not thought it material to ascertain whether or not this is so in the original indictment; in the copy which has been furnished to the court, the marks of quotation include both the words of the innuendoes and the words of the publication. In manuscripts as well as in printed books, it is undoubtedly a common practice to indicate the language borrowed from another, by the use of inverted commas; but we are far from being certain, that these marks are generally understood to import a perfect accuracy of quotation. A writer, anxious to escape the charge of plagiarism, would be likely to use these marks, although he appropriated nothing more than the sentiment

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and substantially the language of his author, without aiming at verbal accuracy. Besides, if these marks should be held sufficient to sustain an indictment, they must also be held sufficient to defeat it, whenever a slight mistake is made in the use of them; and the accidental omission to include a single word of the libel in inverted commas, or the including within them of a word which was not in the libel, would be a fatal variance. It sometimes happens that the change of a single comma will give an entirely different meaning to a sentence: suppose a pleader to have occasion to set out a sentence of this description, would the misplacing or the omission of a comma, thereby leaving the meaning equivocal, be fatal to the indictment? Had we the power to do it, we should doubt the expediency of introducing a new rule in pleading, the probable effect of which would be, to throw additional embarrassments in the way of the pleader, and to increase the chance of escape, by means of merely clerical mistakes or technical errors.

The practice in arraignments is to read the indictment to the prisoner, and then to receive his plea. His knowledge of the charge against him is derived, ordinarily, from hearing the indictment read, and not from the inspection of it. But these indications of the meaning of the pleader are addressed to the eye: they are not perceptible by the ear; and if the rule of construction contended for be correct, this well established practice is clearly wrong.

It was also contended that the word "purport," used in the indictment, is equivalent to tenor, and imports a strict recital of the words of the libel. But in our view this is not necessarily, the import of the term. The purport of a message or communication may be, and indeed generally is, stated, without the use of the identical words in which it is conceived. It is equivalent to substance, and such was its construction, by the court, in the case of the *Commonwealth* v. *Parmenter*, before cited.

"The word *tenor* imports an exact copy, — that it is set forth in the words and figures, — whereas the word *purport*

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means only the substance or general import of the instrument." 2 Gabbett Cr. Law, 201.

The court are of opinion that this indictment is defective, and that judgment must be arrested.

Note. Mr. Davis's Precedents being a book of practice in very general use, it seems desirable to point out those forms in it, which are affected by the decision in this case. The following contain the objectionable words: Nos. 99, and 100, under the head of *Challenging to Fight*, (which are adopted with modifications from 3 Chitty C. L. 848, 852); Nos. 152, 153, 154, 155, 156, 157, 158, 159, 160, 170, 171, 172, 173, under the head of *Forgery and Counterfeiting*, all of which were drawn by Mr. Davis, and No. 169, under the same head, which was taken from the Crown C. C. (6th Ed.) 360; Nos. 209, (3 Chitty C. L. 889,) 212, (3 Chitty, 887,) 214, (3 Chitty, 911,) 215, (3 Chitty, 914,) 217, (Crown Cir. Ass. 73,) 218, (3 Chitty, 889,) 219, (Archbold, C. P. 501; 2 Chitty 14,) 220, under the head of *Libel*. In several of the many forms, which appear to have been adopted by the author from English precedents, the usual and apt words, such as "tenor," &c., are struck out, and the words "purport," "effect," "substance," inserted. This is the case in Nos. 169, 209, 212, 214, 215, 217, 218, 219, 220, which have been examined. It is remarkable, however, that the forms of indictment, for challenging, Nos. 104 and 107, and for libel, Nos. 210 and 211, in which the alteration seems equally proper, retain the apt and technical words of recital.

Commonwealth *vs.* Walter Scott Tarbox.

An indictment for printing, publishing, or distributing an obscene paper, within the Rev. Sts. *c.* 130, § 10, must not only set out the printed paper in the very words of which it is composed, but must also profess to do so, by means of appropriate words for the purpose; unless the language is so obscene as to render it improper that it should appear upon the record; and in that case, the reason for the omission should be stated in the indictment.

The attaching of one of the original printed papers to the indictment, in place of inserting a copy, is not a sufficient indication, that the paper is set out in the very words.

The defendant, described in the indictment as a physician, was indicted and tried in the municipal court of the city of Boston, for printing, publishing, and distributing, a paper containing obscene language and descriptions, and for receiving and having in his possession, great numbers of similar

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printed papers, for the purpose of exhibition and circulation, and with the intent to introduce the same into the families of the citizens of said city, contrary to the provisions of the Rev. Sts. c. 130, § 10.

The indictment contained two counts.

The first count alleged, that the defendant, "on the twenty-eighth day of January, in the year of our Lord eighteen hundred and forty-seven, at Boston aforesaid, did print, publish, and distribute a certain printed paper, containing obscene language and descriptions manifestly tending to the corruption of the morals of youth, which printed paper was distributed and left at the doors of the dwelling-houses of many, to wit, of one hundred of the citizens of Boston, which printed paper containing obscene language, and manifestly tending to the corruption of the morals of the young, and distributed as aforesaid, is of the purport and effect following,* that is to say," [here is inserted a printed copy of the alleged obscene publication] "against the peace, &c., and contrary to the form of the statute," &c.

The second count alleged, that the defendant on the day and year above mentioned, at Boston aforesaid, "did procure, receive, and have in his possession in great numbers, to wit, the number of one thousand, a certain other printed paper containing obscene language and descriptions, manifestly tending to the corruption of the morals of youth, for the purpose of exhibition and circulation, and with the intent to introduce the same into the families of the citizens of said city of Boston, which printed paper is of the purport and effect following, that is to say," [here is inserted a printed copy of the alleged obscene publication] "against the peace, &c., and contrary to the form of the statute," &c.

The defendant, being convicted, moved in arrest of judgment, for the following reasons:

* It has not been deemed necessary, to the understanding of the case, to insert the alleged obscene publication. It purported to be an advertisement, by the defendant, of an instrument for sale by him for the prevention of conception.

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First, that the indictment does not profess to set out the words or tenor of the alleged obscene publication, but only the substance thereof; nor does it aver any reason or excuse for not setting out the words;

Second, the publication is not, on its face, obscene, and the indictment contains no innuendoes or other averments making it so;

Third, the proper averments of time and place are omitted as to the distribution alleged in the first count, and as to the intent charged in the second.

This motion was overruled, and the defendant thereupon filed exceptions to the decision of the municipal court.

The objection, that the indictment does not profess to set out the words or tenor of the publication, having been already considered, so far as the general principle is concerned, in the case immediately preceding of *Commonwealth* v. *Wright*, the arguments as to that point are omitted.

Joel P. Bishop and *Annis Merrill*, for the defendant. The question as to the *first* ground of exception is, whether an indictment on the Rev. Sts. *c.* 130, § 10, relating to the printing and distributing of obscene papers, is governed by the same rules, as to setting out the very words, as an indictment for a libel.

In *Commonwealth* v. *Holmes*, 17 Mass. 336, the defendant was indicted for an obscene publication, and it was held by the court, that the publication need not be set out; it being sufficient to aver its obscenity generally, without minutely spreading the particulars upon the records. At the same time, the reason for omitting the statement was given in the indictment, namely, that the publication was so obscene as to render it improper that it should appear on the record. The rule is, that where a written instrument is the *gist* of the offence, the very words of it must be set out, except in cases of the class just alluded to, and then a reason must be assigned in the indictment for the omission. *Commonwealth* v. *Houghton*, 8 Mass. 107; *United States* v *Britton*, 2 Mason, 464.

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The *second* ground of objection is, that the publication, as it is stated in the indictment, is not obscene. This indictment is founded on the Rev. Sts. *c.* 130, § 10. We contend, *first*, that if the statute is fairly susceptible of an interpretation, upon which the court can see, that the publication in question may have any one good purpose, it cannot be considered as an obscene publication; and, *second*, that the publication, as set out in the indictment, is not obscene. The last point will be first considered.

The publication, as set out in the indictment, is not obscene; 1. Because it is not alleged, that the defendant left these papers at the doors of the citizens; the defendant might have published, and another person left them. 2. It does not appear from the indictment, that the defendant published more than one paper. If the indictment had alleged the distribution of more than one, it would have been bad for duplicity. The indictment charges the defendant with printing and publishing one paper, which was distributed (the indictment does not say by the defendant) at one hundred houses. 3. There is no allegation of a general distribution of these papers, which is necessary to constitute the offence prohibited by the statute. Indecent acts, if public, are indictable; it is otherwise, if they are committed in private. The distribution alleged in this indictment might have been private and for justifiable purposes.

If the single paper, which the defendant is thus charged with publishing and distributing, could have been properly published, under any circumstances; if the defendant, being a physician, could have innocently delivered this paper to a patient, or to any other person; then there is no crime alleged in the first count.

There are no innuendoes in this indictment; — no averment or allegation as to the intent: — it is only stated that the defendant published the paper. If there are no averments in an indictment for libel, showing the matter published to be necessarily libellous, there is no offence charged

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Commonwealth v. *Child*, 10 Pick. 252. Rejecting the surplusage, there is nothing here to show an offence; for any thing that appears, the publication might have been strictly confidential. The second count amounts to nothing more than the first. The jury would have been warranted in their verdict, if the defendant had had but a single paper for exhibition. The court, therefore, cannot infer from the verdict, that any thing further was proved; and, if the defendant could have properly had one such paper in his possession for exhibition to any body, there is no offence charged. The defendant must be presumed to have circulated the paper only as he had a right to do.

As to the ground, first above suggested, touching the interpretation of the statute: — if the defendant could legally have done what is sufficiently and properly charged against him in the indictment, he cannot be held on the first count. Does this statute mean to punish the printers, publishers, and sellers of physiological, or anatomical books, or of works on midwifery? to shut the door against scientific pursuits of this description? or to punish a physician for doing what may be necessary in the course of his practice? There is a large class of cases, undoubtedly, which, if published, could not be supposed to be so for any good purpose; and these must be considered as prohibited by the statute; but such publications, as may have a scientific and useful purpose, are not intended to be prohibited, unless their scientific use is a mere pretence. "Acts of parliament," says lord Coke, "are so to be construed, as that no man that is innocent, or free from injury or wrong, be, by a natural (that is, literal) construction, punished or endangered." Coke Litt. 360*a*; Dwarris on Statutes, Part II. 726.

If the statute does not intend to prohibit a publication with a good purpose, and the court cannot see that the publication complained of can be for no good purpose, then the defendant cannot be held on this indictment. In the case of *The King* v. *Younger*, 5 Term R. 449, which was an indictment against

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the defendant, who was a baker, for baking dinners for his customers on Sunday, contrary to the statute of 29 Charles II. ch. 7, which provides that no tradesman, &c., shall exercise any worldly labor, business, or work, of their ordinary callings upon the Lord's day, lord Kenyon, C. J., said: "With regard to the act, on which this conviction is founded, I think we should construe it equitably, so as that it may answer the purposes of public convenience, taking care, at the same time, that Sunday should not be profaned." The other judges concurred in this view. So, in the case of *Knowles* v. *The State*, 3 Day, 301, which was a criminal information against the plaintiff, for exhibiting shows, &c., contrary to law, the court said: "The word *shows*, which can alone apply to this case, has no technical meaning, known in law; and it cannot be extended by construction, to render criminal the mere exhibition of a work of art, a natural curiosity, or the collections of a museum."

S. D. Parker, for the commonwealth.

1. In this case, one of the original papers is attached to the indictment and makes a part of it. This meets the objection as to not professing to set out the very words, and is an indication quite as strong as could be expressed in language. With an indictment drawn as this is, it is almost absurd to argue, that the defendant is not permitted to know what he is charged with.

2. It is surprising, that any one should pretend that this publication, on the face of it, is not obscene. It is a compound of falsehood, fraud, and obscenity. The last paragraph, but one, especially, is exceedingly obscene, disgusting, and corrupting. As to there not being any innuendoes, — it is enough that the meaning is plain without them.

3. The answer to the third objection, — the omission of the words *then and there* with respect to certain allegations in the indictment, — is, that each of the counts in an indictment is but a single long sentence, containing only one statement of time and place, to which every allegation is to be referred. 2 Ld. Raym. 1461.

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Forbes, J. In this case the same objections are made to the form of the indictment as in the case of *Commonwealth* v. *Wright*, and for the reasons stated in that case judgment must be arrested.

The matter charged in this indictment, if properly set out, would clearly constitute an offence within the Rev. Sts. c. 130, § 10. In indictments for offences of this description, it is not always necessary that the contents of the publication should be inserted; but, whenever it is necessary to do so, or whenever the indictment undertakes to state the contents, whether necessary or not, the same rule prevails as in the case of libel, that is to say, the alleged obscene publication must be set out in the very words of which it is composed, and the indictment must undertake or profess to do so, by the use of appropriate language. The excepted cases occur, whenever a publication of this character is so obscene, as to render it improper that it should appear on the record; and, then, the statement of the contents may be omitted altogether, and a description thereof substituted; but, in this case, a reason for the omission must appear in the indictment, by proper averments. The case of *Commonwealth* v. *Holmes*, 17 Mass. 336, furnishes both an authority and a precedent for this form of pleading. In the present case, the indictment sets out the printed paper according to its purport and effect, and not in *hæc verba*, or according to its tenor, or by words importing an exact transcript. The mode of pleading adopted cannot be sustained, and the indictment being insufficient, judgment is arrested.

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Joseph A. Tolman vs. The Manufacturers Insurance Company.

A policy of insurance against fire contained a proviso, allowing the insurers, at their election, instead of paying a loss in money, to replace the property lost or damaged, with other of the like kind and quality, within sixty days after notice of the loss or damage: after a loss under such a policy, the assured, by an order thereon, directed the loss to be paid to another, and the insurers assented thereto: it was held, that such order and assent operated only as an assignment of the claim of the assured under the policy, without affecting the right of the insurers to replace the property lost or destroyed, or to pay the amount of the loss in money, at their election.

This cause was tried before *Shaw*, C. J., from whose report thereof, for the consideration of the whole court, the following facts appeared.

Charles Wellington, being the owner of an unfinished dwelling-house, in Charlestown, which was under a mortgage for $800, sold and conveyed his interest therein, for $200, to Robert Kellen, who was to pay the sum due on the mortgage.

On the 3d of May, 1845, the defendants, by a policy duly executed, insured Kellen against a loss of the premises by fire, in the sum of $1000, for one year. The policy contained a clause, by which it was provided, that the sum insured should be paid "to the said Kellen, within sixty days after proof of such loss or damage, unless within sixty days after notice of such loss or damage, the said company shall have replaced the said property, lost or damaged, with other of the like kind and quality, at the election of the said company."

The building insured was destroyed by fire on the 27th or 28th of May, 1845, and due notice of the loss was given to the defendants. Shortly afterwards, Kellen made an order, in writing, indorsed on the policy, directing the defendants to pay the loss under the same to the plaintiff. This arrangement was assented to by the president of the defendants, acting for them, by an indorsement in writing on the policy. The order and assent are as follows:

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"May 29, 1845. Pay the loss under the within policy to Joseph A. Tolman. Robert Kellen.

Assented to. C. W. Cartwright, Pres."

The plaintiff demanded payment of the loss, at the office of the defendants, who refused to pay the same; but the president said, that he was going to rebuild the house; and the defendants did, accordingly, replace the building destroyed with another of the like kind and quality, and of equal value.

The plaintiff brought this action on the policy to recover the amount of the loss.

It was contended, on the part of the plaintiff, that the assent of the president (whose authority in this respect was not denied) was a waiver, by the company, of their right to rebuild, and an agreement to pay the loss in money to the plaintiff, sufficient to enable him to maintain this action therefor, in his own name.

On the part of the defendants, it was contended, that this assent was not an election to pay the money, or a waiver of their right to rebuild; but that they retained that right under the policy, as well after the assignment as before.

The judge ruled: 1. That the indorsement on the policy, and the assent thereto by the president of the defendants, did not amount to an election to pay the money and waive the right to rebuild, but was merely an assent to the assignment by the plaintiff; that the defendants had notwithstanding a right to rebuild; and, having rebuilt, that was a satisfaction of the loss.

2. That the order indorsed on the policy was not in the nature of a draft for money, and that the assent thereto by the defendants was not an acceptance, upon which an action would lie by the plaintiff against the defendants.

3. That the indorsement by the assured was an authority to the plaintiff to settle with the defendants, and their assent thereto was an admission and acknowledgment of that authority; or it amounted to an assignment of a chose in action, which did not authorize the plaintiff to bring an action in his own name.

A nonsuit was thereupon entered, subject to the opinion of

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the whole court. If the directions were right, judgment was to be entered on the nonsuit for the defendants: otherwise, the defendants were to be defaulted, and the case to be referred to an auditor to determine the amount due, or a new trial was to be had, as the court might order.

The cause was argued at a former term by *A. B. Merrill*, for the plaintiff, and *C. A. Welch*, for the defendants.

Forbes, J. The view which the court take of this case makes it necessary to consider only the ruling first stated; because, if the order indorsed upon the policy ought not to receive the construction put upon it by the plaintiff, the action cannot be maintained. The plaintiff insists that it is an order for the payment of money absolutely; that it has no connection with the policy, except by way of reference to it, for the purpose of ascertaining the amount to be paid, and, having been accepted, is binding upon the defendants; that it does not in fact differ in any essential particular from a common order for money.

The stress of the argument for the plaintiff rests upon the import of the word "pay," as used in the indorsement. It is contended, that the word, in this connection, can imply nothing but an acquittal or discharge of the obligation in money, and that such is the meaning, force, and effect of the term in this and similar instruments. If this construction be correct, the defendants, having agreed to compensate the loss in money, may fairly be presumed to have waived their right to replace the building. But we are not satisfied that this construction is correct, or that the meaning of the term is restricted, in the manner supposed, by the *jus et norma loquendi*. An obligation to deliver merchandise is familiarly said to be *paid* by a delivery of the merchandise, and the use of the term, in this connection, is common, and strictly appropriate. Notes payable in goods or money, at the election of the promisor, are not of unfrequent occurrence. "Pay the within" to a third person, indorsed upon a note of this description, together with a delivery of the note, would operate as an assignment in equity, and if assented to by the

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promisor, might lay the foundation for an action in the name of the assignee. But this would not change the nature of the original promise; the note would continue to be payable in goods or money, at the option of the maker. Yet, if the effect of the word "pay" be such as the plaintiff contends, the election of the promisor would be at an end, and the note must be paid in money.

"To pay," is defined by lexicographers, "To discharge a debt, to deliver a creditor the value of a debt, either in money or in goods, to his acceptance or satisfaction, by which the obligation of the debt is discharged; to discharge a duty created by a promise, or by custom, or by the moral law; to fulfil; to perform what is promised." Webster's Dict.

To pay, therefore, is to discharge an obligation by a performance according to its terms or requirements: if the obligation be for money, the payment is made in money; if for merchandise or labor, a delivery of the merchandise or a performance of the labor is payment; or if for the erection of a building, performance according to the terms of the contract is payment. The indorsement in this case is not, "Pay the loss in money," or even, "Pay the amount of the loss," but simply, "Pay the loss." We consider the effect of this indorsement to be the same as if written out more fully in this manner: "Pay or discharge the obligation arising from the loss under the policy to, or for the benefit of, Joseph A. Tolman;" in other words, that it operated as an assignment to the plaintiff of Kellen's claim under the policy, without affecting, in the least, the right of the defendants to replace the building, or to pay the amount of the loss in money, at their election, according to the terms of the policy. The defendants having replaced the building, this action cannot be sustained.

It appears from the papers on file, that on the 12th of April, 1845, Kellen mortgaged the premises to the plaintiff, to secure the sum of five hundred dollars. The plaintiff, then, was a second mortgagee, and this fact discloses an inducement, on the part of the plaintiff, to obtain the control of the

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policy; for if the defendants had paid Kellen the amount of the loss in money, the plaintiff, so far as appears, would have had no means of compelling him to expend it in the erection of another building; and to that extent the plaintiff's security would have been impaired: whereas the assignment placed the plaintiff in a situation in which he must be benefited, whether the defendants erected another building or paid the amount of the loss in money.

The court are of opinion that the nonsuit must stand, and, according to the agreement of the parties, judgment is to be entered for the defendants.

JOSEPH W. MERRIAM *vs.* SAMUEL K. BAYLEY.

In an action against an insolvent debtor, to recover a debt, from which he has been discharged, the plaintiff must prove a distinct and unequivocal promise to pay the debt; and the mere payment of a part of a note so discharged, and the indorsement thereon by the debtor of the sum paid, are not sufficient to authorize a jury to infer such distinct and unequivocal promise to pay the residue.

THIS case was submitted to the court of common pleas, upon an agreed statement of facts, from which the court were to draw such inferences, as, in their opinion, ought to be made by a jury.

From this statement, it appeared, that the defendant gave the plaintiff his promissory note, dated November 28, 1839, for the sum of one hundred and forty-six dollars and fifty cents, payable to the plaintiff, or his order, on demand, in sixty days; that, on the 10th of July, 1840, the defendant obtained his discharge, as an insolvent debtor; that the note was not proved or offered for proof against the defendant's estate, under the proceedings in insolvency; that, at the time of making the note, both the parties to it were, and ever since had been, citizens of this commonwealth; and, that, on the 5th of January, 1841, the defendant paid the plaintiff twenty-five dollars in part of the note, and, at the same time

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indorsed the payment thereof on the note, with his own hand, in the words and figures following, namely: "January 5th, 1841. Received of the within twenty-five dollars. $25."

On the facts thus stated, judgment was rendered for the defendant; the plaintiff, thereupon, appealed to this court.

W. J. Hubbard, for the plaintiff.

C. A. Welch, for the defendant.

METCALF, J. The only question in this case is, whether a jury ought to infer, from the facts agreed, that the defendant has made such an acknowledgment or promise as binds him to pay the sum which remains unpaid on his note.

The plaintiff's counsel rely on the effect given to part payment, in taking a case out of the operation of the statute of limitations, and insist that the same effect should be given to the payment made in this case. The only authority cited, which tends to support this position, is *Alsop* v. *Brown*, 1 Doug. 192, where lord Mansfield is reported to have said, that if a certificated bankrupt had paid interest on his bond, "he might be liable, as on a new contract," to pay the principal. But it was afterwards held by lord Ellenborough, that in a suit on a new promise, made by a bankrupt, to pay a debt from which he had been discharged, the plaintiff must prove a distinct and unequivocal promise to pay it. *Lynbuy* v. *Weightman*, 5 Esp. R. 198; *Fleming* v. *Hayne*, 1 Stark. R. 370. And so the recent English writers state the law to have been, before *St.* 6 Geo. IV. *c.* 16, § 131, required such promises to be in writing, and signed by the party, or by some person thereto authorized by him in writing. Esp. on Bankrupt Laws, 340; 1 Cooke's Bankrupt Laws, (8th ed.) 504; Wilkinson on Lim. 152; 1 Steph. N. P. 148. The same strict rule of proof is applied to new promises alleged to have been made by discharged insolvent debtors. *Mucklow* v. *St. John*, 4 Taunt. 613; *Brook* v. *Wood*, 13 Price, 667; *Depuy* v. *Swart*, 3 Wend. 139; *Moore* v. *Viele*, 4 Wend. 422. We think this is a fit and salutary rule, and that it must be applied to the case before us. It therefore follows, that a jury ought not to infer, from the mere fact that the defendant paid part

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of his note to the plaintiff, and indorsed thereon the sum paid, that he made a distinct and unequivocal promise to pay the rest of it. Part payment is not of itself conclusive, even to take a case out of the statute of limitations. The circumstances that attend such a payment may wholly disprove a promise to pay any more. *Wainman* v. *Kynman*, 1 Welsb. Hurlst. & Gord. 118.

Judgment for the defendant.

ANTHONY BRACKETT & another *vs.* FRANKLIN EVANS.

Where the declaration alleged, that the defendant, in consideration that the plaintiff would sell and convey to him five dwelling-houses, &c., promised to pay the taxes that were or should be assessed thereon for the current year; and the proof showed, that the payment of the taxes was not the whole consideration of the conveyance: — it was held, that there was no variance.

Where the purchaser of real estate promised the seller to pay the taxes thereon for the current year, and, on being notified of the assessment, neglected to pay the same, and the seller thereupon himself paid the taxes; the latter was held to be entitled to recover the amount so paid without a previous demand.

A promise by the purchaser of real estate, at the time of the conveyance, to pay the taxes that are or may be assessed thereon, for the current year, is not "a contract for the sale of lands, &c., or of any interest in or concerning the same," within the meaning of the Rev. Sts. *c.* 74, § 1.

A conveyance of real estate cannot be proved by oral testimony without first giving a sufficient reason for not producing the deed.

THIS action was brought to recover the sum of fifty-five dollars and sixty cents, being the amount of taxes, for the year 1845, on certain real estate belonging to the defendant, which sum had been paid by the plaintiffs, under the following circumstances.

The plaintiffs, being the owners of five brick dwelling-houses, in Boston, sold and conveyed the same to the defendant, in June, 1845; and, as a part of the consideration for the conveyance, the defendant agreed to pay the taxes which should be assessed thereon, as of the first of May, 1845. It was proposed, at the time the agreement was made, that it should be inserted in the deeds of conveyance, but the defendant objected, saying, that his word was good and

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adding, "here is a witness that I agree to pay them." When the taxes were assessed, the defendant was called upon to pay them; but he did not do so, and they were paid by the plaintiffs; who, thereupon, but without any previous demand upon the defendant, commenced this action to recover the amount.

The declaration contained a general count, alleging the indebtedness of the defendant to the plaintiffs in the sum above mentioned, as and for so much money, paid, laid out, and expended by them for his use; and also a special count, stating that the defendant, in consideration that the plaintiffs would sell and convey to the defendant five brick dwelling-houses, with the land thereto belonging, the defendant promised to pay the taxes which were or should be assessed thereon, for the year 1845, and that the plaintiffs did execute and deliver deeds accordingly, yet that the defendant had not paid the same, &c.

On the trial, in the court of common pleas, before *Colby*, J., evidence having been given of the facts above stated, the defendant objected, 1, that there was no other than paro' evidence of the conveyance of the houses, and, in fact, no other was given; 2, that the contract proved so far related to an interest in real estate, that it was within the statute of frauds; 3, that there was a variance between the declaration and the proof, in reference to the consideration alleged for the promise; and 4, that the plaintiffs after payment of the taxes should have proved a demand thereof of the defendant before commencing this action. These objections being overruled by the judge, the jury returned a verdict for the plaintiffs and the defendant filed exceptions.

E. A. Dana, for the defendant. 1. A conveyance of real estate can only be proved by the production of the deed by which it is made, where the deed is in existence, and within the power of the party to produce; and, therefore, parol evidence is inadmissible to prove such a conveyance, without first accounting for the non-production of the deed.

2. The contract was within the statute of frauds, (Rev. Sts.

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c. 74, § 1,) as a contract for the sale of lands, &c., or of some interest in or concerning lands, and, therefore, should have been in writing. *Dillingham* v. *Runnels*, 4 Mass. 400; *Pitts* v. *Waugh & another*, 4 Mass. 424; *Davenport* v. *Mason*, 15 Mass. 85; *Boyd* v. *Stone*, 11 Mass. 342; *Buttemere* v. *Hays*, 5 Meeson & Wels. 456; *Howard* v. *Eaton*, 7 Johns. 205; *Wilkinson* v. *Scott*, 17 Mass. 249; *Pomeroy* v. *Winship*, 12 Mass. 514; *Adams* v. *Townsend*, 1 Met. 483; *Kidder* v. *Hunt*, 1 Pick. 328; Chitty on Cont. 366, note.

3. This action can only be sustained upon the special count; 1 Chitty on P. 271; *Spencer* v. *Parry*, 1 Ad. & Ell. 331; and there is a variance between that count and the proof, as to the statement of the consideration for the conveyance of the land.

4. A previous demand was necessary, after payment of the taxes by the defendant, to enable him to maintain this action.

J. Field, for the plaintiffs, argued, 1, that the defendant did not undertake to prove any thing in the deeds by parol evidence, but only that the deeds were delivered; 2, that the contract did not relate to or concern lands, or any interest therein, but was a mere agreement to pay the taxes which might be assessed on the same. *Weld* v. *Nicholls*, 17 Pick. 538.

Metcalf, J. 1. There is no ground for the objection of variance between the allegation and the proof of the consideration of the defendant's promise. The special count avers that the defendant, in consideration that the plaintiff would sell and convey to him five dwelling-houses, with the land thereto belonging, promised to pay the taxes that were or should be assessed thereon for the year 1845. The alleged variance is, that the proof showed that the payment of the taxes was not the whole consideration of the conveyance of the houses. But the consideration of the plaintiff's conveyance was not the same thing as the consideration of the defendant's promise.

2. As the defendant promised to do a certain act, and failed to do it he became liable to an action for a breach of

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his promise, without any previous demand on him. *Lent* v. *Padelford*, 10 Mass. 230.

3. The statute of frauds furnishes no defence to this action. A promise to pay the taxes, that are or may be assessed on real estate, is not a "contract for the sale of lands, tenements or hereditaments, or of any interest in or concerning the same," within the meaning of the Rev. Sts. c. 74, § 1. *Price* v. *Leyburn*, Gow, 109; *Lowe* v. *Winters*, 5 Cow. 263; *Owen* v. *Estes*, 5 Mass. 330; *Weld* v. *Nichols*, 17 Pick. 538. Besides; the contract is executed by the plaintiff, and the defendant has received a conveyance of the houses, on the faith of his promise to pay the taxes thereon, so that the statute would not avail him, if his promise had originally been within it. A party who receives a grant of land, on his promise to pay for it, cannot avoid payment by showing that his promise was not in writing. *Pomeroy* v. *Winship*, 12 Mass. 523; *Bowers* v. *Bell*, 20 Johns. 338; *Baxter* v. *Gay*, 14 Connect. 119; *Gray* v. *Hill*, Ry. & Mood. 420; Gow, *ubi sup.*; Addison on Contracts, 94, and cases there cited.

4. The other exception is sustained. The conveyance of the houses to the defendant could not legally be proved by oral testimony, unless the defendant, after notice to produce the deed, had refused to do so. On this ground alone a new trial is granted.

MATTHEW BARTLETT *vs.* ELISHA PARKS & others.

Where one of two partners, after a dissolution, consigned partnership property to an agent for sale, the proceeds to be applied to the payment of a partnership debt, the other partner was held to be entitled to a remedy in equity against the agent, under the Rev. Sts. c. 118, § 43.

The partner, by whom the consignment was made, having become insolvent, he and his assignee were properly made defendants.

THIS was a bill in equity containing a statement of the following facts. Matthew Bartlett, the plaintiff, and John Townsend, one of the defendants, on the 6th of April, 1844,

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entered into a partnership, under the name of John Townsend, for the purpose of manufacturing goods at South Berwick, in the state of Maine.

At the time this partnership was formed, the plaintiff and Elisha Parks and N. Austin Parks, two of the defendants, constituted a partnership doing business in Boston, under the name and style of Parks, Bartlett and company.

At the time the first named partnership was formed, it was agreed between the two firms, that the business of the former in Boston should be transacted by the latter, who were to sell and advance upon the goods manufactured by the former.

On the 20th of May, 1844, the firm of Parks, Bartlett and company was dissolved, and was succeeded by a new partnership, consisting of Elisha Parks, N. Austin Parks, and Edward Baldwin, another of the respondents, under the name and style of Parks, Baldwin and Parks.

At the time of the formation of this new partnership, Townsend and the plaintiff were indebted to the firm of Parks, Bartlett and company, in a balance of about six thousand five hundred and ten dollars and ten cents; which, with the consent of all parties, was assigned by Parks, Bartlett and company, to Parks, Baldwin and Parks. The new firm continued to act as the agents of Townsend and the plaintiff, until the dissolution of the latter, which took place on the 9th of July, 1844; at which time, they were indebted to Parks, Baldwin and Parks, in the sum of ten thousand six hundred and fifty-two dollars.

The dissolution between the plaintiff and Townsend was known to Parks, Baldwin and Parks, at the time it took place; and a new agreement was then entered into between them and Townsend, by which they undertook to transact business for him, in Boston, as his agent, and for his sole account.

On the 20th of August, 1844, Townsend ceased to do business on his own account, and became insolvent. He was then indebted to Parks, Baldwin and Parks, in the sum of four thousand dollars, all of which had been contracted

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subsequently to the dissolution of the partnership between him and the plaintiff. Townsend took advantage of the insolvent law, and John Dallinger, Jr., one of the respondents, was appointed his assignee.

At the time of the dissolution between Townsend and the plaintiff, they were possessed of property more than sufficient, by about the sum of fifteen thousand dollars, to pay all their partnership debts; and it was then agreed between them, with the knowledge of Parks, Baldwin and Parks, that the property should be applied to the payment of those debts. At the same time, and subsequently thereto, Townsend consigned to Parks, Baldwin and Parks, for sale, certain of the partnership property, with the intention that it should be applied to the payment of the partnership debt above mentioned; and Parks, Baldwin and Parks were then or shortly afterwards informed, that the property consigned to them was partnership property, and to be applied to the payment of the partnership debt.

On the 4th of May, 1844, Townsend and the plaintiff effected insurance in their partnership name, on certain partnership property, to the amount of seven thousand dollars, payable in case of loss to Parks, Bartlett and company, to whose interest therein the firm of Parks, Baldwin and Parks succeeded.

A portion of the property so insured was subsequently destroyed by fire. Parks, Baldwin and Parks have received three thousand five hundred dollars, on account of the loss, and are entitled to receive a further sum.

The plaintiff requested Parks, Baldwin and Parks to appropriate the proceeds of the goods consigned to them as above mentioned, together with the money which they had received on the policy of insurance, to the payment of the partnership debt due from the plaintiff and Townsend to them; but they refused to make such application, claiming the right to apply the funds in their hands in payment of Townsend's individual debt, and demanding payment, from the plaintiff personally, of the balance of the partnership debt due from him and Townsend.

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The prayer of the bill was, that an account might be taken of what was due from the plaintiff and Townsend, at the time of the dissolution of their partnership, to Parks, Baldwin and Parks, and of all the partnership property of the former received by the latter at any time; that Parks, Baldwin and Parks might be ordered to apply the property and funds in their hands, first, to the payment of the joint debt of Townsend and the plaintiff, and, next, to pay over one half of the balance to the plaintiff; and that Parks, Baldwin and Parks might be enjoined from proceeding at law against the plaintiff, for the recovery of the partnership debt due from him and Townsend, and for further relief.

The bill was demurred to on the ground, 1st, that the court had no jurisdiction, the remedy of the plaintiff being adequate at law; and, 2d, that John Townsend and John Dallinger, Jr., ought not to have been made parties defendant.

B. Rand, for the defendants.

F. C. Loring & J. P. Putnam, for the plaintiff.

Wilde, J. The defendants demur to the bill on two grounds: 1st, because the court has no jurisdiction, the remedy of the plaintiff being adequate at law; and, 2d, because John Townsend and John Dallinger, Jr., ought not to have been joined as party defendants.

As to the first ground of demurrer, we have no doubt that the court has jurisdiction.

By the Rev. Sts. c. 118, § 43, the action of account is abolished; and it is further provided, "that when the nature of an account is such that it cannot be conveniently and properly adjusted and settled in an action of assumpsit, it may be done upon a bill in equity."

The language of the statute is comprehensive, and in terms gives this court jurisdiction in equity in all cases where an account is to be settled, which cannot be conveniently settled in an action of assumpsit, whether in such cases an action of account would lie before the statute or not. And this construction of the statute would not give to the court a more ample jurisdiction than courts of equity have in Eng-

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land, where a bill for an account is sustained in many cases in which an action of account would not lie. In this case, however, an action of account, if not abolished, would lie. That action lies against a bailiff or receiver. Bac. Abr. Account, A.; Jacob's L. D. Account, 24; Co. Lit. 171.

The bill alleges, that the plaintiff's partner consigned to the defendants, Parks, Baldwin and Parks, partnership property for sale, the proceeds to be applied to the payment of a partnership debt. In such a case, an action of account would unquestionably lie; and it is unquestionable, also, that the account, sought to be settled in the present case, cannot be conveniently settled in an action of assumpsit. A jury is an unsuitable tribunal for adjusting matters of account; and although the law authorizing a reference to an auditor, and making his report *prima facie* evidence, in such cases, has removed some difficulties, still, accounts generally cannot be conveniently thus settled. The plaintiff, in the present case, is entitled to a discovery, and to the production of the defendants' books, and it would be inconvenient and unreasonable that he should be compelled to resort to a court of equity for a discovery, and to a court of law for relief, when the whole case might be settled and decided most beneficially for both parties by a court of equity.

As to the other ground of demurrer, the court are of opinion, that Townsend and Dallinger are properly joined as defendants. Their interest is opposed to that of the plaintiff. But if it were otherwise, they could not be compelled to join with the plaintiff, and might be made defendants, according to a well known rule of equity; and Townsend, if not interested, may well be made a party for the purpose of discovery, as to all acts done by him before his insolvency, and the assignment of his property.

Demurrer overruled.

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Albert Sanderson *vs.* Thomas L. Taylor.

The twelfth section of the insolvent act (St. 1838, *c.* 163), relating to the calling of a third meeting of creditors, is not repealed by the act of 1844, *c.* 178; and, therefore, where a third meeting of creditors has not been called, a certificate of the insolvent's discharge is not valid against a creditor who has not proved his claim.

The facts of this case, which was argued by *G. Farrar*, for the defendant, and by *F. W. Sawyer*, for the plaintiff, are sufficiently stated in the opinion of the court.

Forbes, J. This case comes before the court, from the court of common pleas, upon a bill of exceptions. The action is assumpsit; the defence, a discharge under the insolvent laws of the commonwealth. The plaintiff objected that the discharge was invalid, and the objection was sustained by the court below. The material facts disclosed by the bill of exceptions are as follows: On the 22d of March, 1845, the defendant made a petition to a master in chancery, for the county of Middlesex, to be declared an insolvent. A warrant was issued, returnable on the second Monday of April then next ensuing, at which time certain creditors of the defendant proved their claims, and made choice of an assignee. The assignment was made on the 16th of April. The second meeting of creditors was held on the second Monday of May; at which meeting other creditors proved their claims. On the 25th day of September following, the plaintiff, together with several other persons, representing themselves to be creditors of the defendant, applied to the master to call a third meeting of creditors, to be held on the second Monday of October, to enable them to prove their claims, in season to act upon the question of the defendant's discharge. The master declined to call a third meeting, and a third meeting was not in fact called. A discharge was granted on the 17th of October, 1845. The assets of the defendant were not sufficient to pay fifty per cent. on the amount of claims proved at the time the discharge was granted. Some discussion took place at the bar, in relation to the power of

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the master to receive and act upon the petition of the 25th of September. That question, however, we do not think material; for if the discharge was not granted according to law, the defendant cannot avail himself of it as a defence to this action, the plaintiff not having proved his claim, there having been no waiver by him of any irregularity in these proceedings. The question is, whether, under the act of 1844, c. 178, a discharge granted to an insolvent debtor is valid against a creditor who has not proved his claim, where a third meeting of creditors has not been called. And we are of opinion that it is not. Under this act, a certificate of discharge could not be granted to an insolvent, until six months after the date of the assignment. *Eastman* v. *Hillard*, 7 Met. 420. The *St.* 1838, *c.* 163, § 12, provides for the calling of a third meeting of the creditors within six months from the time of the appointment of the assignees. The choice or appointment of assignees must precede the assignment, or be contemporaneous with it, so that no certificate of discharge can be granted under the act of 1844, until the expiration of the time within which the third meeting is to be called according to the provisions of the act of 1838. One object for which a third meeting is called, is, to enable those creditors to prove their debts, who have omitted to do so at the first and second meetings. And this right is sometimes of much importance to creditors; they may be prevented from attending the earlier meetings, by misinformation, accident, mistake, want of preparation to substantiate their claims, or other contingencies; and as the first dividend is to be declared at the third meeting, nothing is lost by the delay, except the right of voting for an assignee. In the present case, the plaintiff was deprived of this right by the omission of the master to call a third meeting; and unless this clause in the act of 1838 was repealed by the act of 1844, the discharge is invalid, and the defence to the action will fail. By the last section of the act of 1844, all acts, and parts of acts, inconsistent with the provisions of that act, are repealed. This act, unquestionably, made several

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material alterations in the previous acts in relation to insolvent debtors; but is there any inconsistency in the provisions of the two acts, as to the duty of the master to call a third meeting? No such inconsistency was pointed out at the bar, and we are unable to perceive that any exists. In the case of *Eastman* v. *Hillard*, before cited, the court expressed an opinion, that the act of 1844 did not repeal the direction of § 7 of the act of 1838, in relation to the calling of a second meeting. It was thought that in this respect the two acts were not inconsistent. If this construction of the act was correct, — and we think it was, — it will apply to the third as well as to the second meeting. It appears to us that the decision of the common pleas was right, and that the exceptions must be overruled.

THOMAS L. THRUSTON *vs.* DANIEL McF. THORNTON.

Where a conversation is relied upon as proof of an agreement, it is for the jury to decide, whether such an assent of the minds of the parties took place, as to constitute a valid contract, or whether what passed between them was a loose conversation, not understood or intended as an agreement.

THIS was an action of assumpsit to recover compensation for services, rendered by the plaintiff as a broker, in selling or aiding to sell certain real estate belonging to the defendant. The declaration contained the common money counts, a bill of particulars, and a special count. The cause was tried in the court of common pleas, before *Wells*, C. J.

The bill of particulars set forth a claim by the plaintiff against the defendant of the sum of one thousand dollars and interest, as a commission of five per cent, "as per contract, for selling his farm called Wood Park, in Virginia, which was sold to Marcus Bull, Esq.," through the plaintiff's agency, for twenty thousand dollars.

In the special count, the plaintiff alleged, in substance,

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that, in consideration that at the request of the defendant, he would find a purchaser for and sell and dispose of the defendant's farm above mentioned, the defendant promised to pay him five per cent of the amount for which he should sell the same, as a commission for his services; and that he, confiding in the defendant's promise, did find a purchaser for the estate, for the sum of twenty thousand dollars, to whom the defendant sold and conveyed the same, and received therefor the said sum.

The plaintiff claimed to recover, *first*, as upon a special contract, on the part of the defendant, to pay him a commission of five per cent on the sum for which the estate should be sold; or, *secondly*, if that ground should not be sustained by the evidence, then, a reasonable compensation for his services in effecting the sale.

In order to prove the special agreement relied on by the plaintiff, he introduced the deposition of Cary Selden, who testified, "that, some time in the fall of 1840, or early in the following winter, the defendant was in the city of Washington, and placed in the hands of the deponent a written schedule of certain real and other property, valued at twenty-two thousand one hundred and thirty dollars, with a view of having the same sold; — that some short time thereafter the defendant came into the office occupied jointly by the deponent and the plaintiff, on which occasion, the deponent, at the request of the plaintiff, introduced the latter to the defendant, when the sale of the estate alluded to became the subject of conversation; — that, in the course of the conversation, the plaintiff inquired of the defendant, if he would pay a commission for effecting a sale of the property, to which the defendant replied, that he would pay a commission to any person, who could effect a sale of the property, at the price mentioned in the schedule; — and that this deponent caused a copy of the schedule to be taken for the use of the plaintiff."

It was also testified, on behalf of the plaintiff, that he did

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recommend the estate to Marcus Bull, who called upon the defendant, and purchased the estate for the sum of twenty thousand five hundred dollars.

It appeared in evidence, that the plaintiff was an attorney at law, and, in connection with his business as an attorney, acted as a real estate broker. But, it did not appear, that, at the time of the interview, or at any time prior to the sale of the estate, the defendant knew that the plaintiff ever acted as a broker, or that he was informed that the purchaser was sent to him by the plaintiff.

The defendant contended, and introduced evidence tending to show, that no such conversation as was testified to by Selden ever took place, and that he never gave the plaintiff any written description of the estate.

In relation to the special count, the judge instructed the jury, that if they should be satisfied, that the conversation testified to by Selden took place between these parties, then, in order to determine whether the defendant was liable in the present action, it would be necessary for the jury to understand what constituted a legal and binding contract; and, that, so far as the matters in difference in this case were concerned, it was only necessary for them to fix distinctly in their minds the following part of the definition of a legal contract:

"A contract implies the assent of two minds. This idea is often expressed by the phrase, It takes two to make a bargain. Or, to state it in other words, it must be understood between the parties, that the one party has made an offer, and that the other has accepted it. If one party should make an offer and the other party should not accept it, there would be no contract. There is sometimes an apparent exception to this rule, but it is only apparent. Thus, if a person should put forth an advertisement, offering a reward to any one who would recover lost property; this offer is to no one in particular and no one accepts it at the time it is made. But the meaning of the offer is, that it is made to whomsoever will act upon it; and it is an implied part of the offer, that time

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shall be afforded to any one who chooses to accept it; and, if a person, before the offer is withdrawn, does that which by the terms of the offer will entitle him to the reward, his so acting upon the offer constitutes an acceptance of it, and the party making the offer is bound to fulfil his promise. But, when the parties are face to face, to constitute a contract, the one must offer and the other accept; unless where it is a part of the agreement, that time shall be given to the person to whom the offer is made, to determine whether he will accept or not, in which case, the time given makes a part of the offer."

In view of these instructions, the jury were directed to inquire, whether it was proved, that, at the interview referred to, the minds of the parties met and they made a legal and binding contract; or, whether the transaction was, as contended by the defendant, a loose conversation not understood or intended by them as an agreement; and, as a test, the jury were directed to inquire and determine, whether, when the parties separated, it was understood between them, that the plaintiff should do or attempt any thing for the defendant, in relation to the sale of his estate, in consequence of the conversation which had taken place.

The jury, under these instructions, rendered a verdict for the defendant; and the plaintiff thereupon filed exceptions.

H. H. Fuller & R. F. Fuller, for the plaintiff, argued that the instructions were wrong, as to the necessity of a formal acceptance of an offer made when the parties were face to face; and that the jury should have been instructed, that if the plaintiff acted in consequence of the defendant's offer, the former was entitled to recover. *Williams* v. *Carwardine*, 5 Carr. & P. 566, 574; *Same Case*, 4 Barn. & Adol. 621; *Lancaster* v. *Walsh*, 4 Meeson & Welsby, 16, 22; *Murray* v. *Currie*, 7 Carr. & P. 584; *Horford* v. *Wilson*, 1 Taunt. 12; 20 Am. Jurist, 19. The defendant took less than the price stipulated, but that was no reason why the plaintiff should be deprived of his commission.

J. Dana, for the defendant, cited Rolle's Abr. Action of

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the Case, pl. 1; Comyn's Dig. Action of the Case upon Ass. T. 2.

Wilde, J. On a careful examination of the instructions to the jury, the court have been unable to find any misdirection, or any remarks tending to mislead the jury in their consideration of the evidence. Certainly, the remarks of the judge as to the definition of a legal contract, and as to the necessary requisites to constitute such a contract, were, we think, clearly correct. The jury were then directed to consider the evidence, and to decide whether, "at the interview between the parties, their minds met, and they made a legal and binding contract; or, whether the transaction, as was insisted by the defendant, was a loose conversation, not understood or intended by them as an agreement." We are of opinion, that this direction was entirely correct. It was for the jury to decide, what was the meaning and intention of the parties. The conversation was loose and indefinite, and the jury, we think, might well find, as they did, that no contract was in fact made. But, however this may be, it was a question of fact for the jury; and, we think, they were in no respect misdirected.

Exceptions overruled

Dorcas Fay *vs.* William C. Fay and others.

an order to satisfy the proviso in the Rev. Sts. c. 62, § 4, — "unless it shall clearly appear by the will that the devisor intended to convey a less estate," — the intention of the testator need not be declared in express terms: it is sufficient, if such intention can be clearly and satisfactorily inferred (on a comparison of the different parts of the will), either from particular provisions which are inconsistent with an intent to give a fee, or from the general import, scheme, and object, of the will.

Where a testator, in lieu and bar of dower, devised the "use and improvement" of one third of his real estate to his wife, and bequeathed her certain personal estate, during her life, and the income of certain other personal estate, during her widowhood, and also made devises in fee of certain real estate, by the use of the proper technical terms: it was held, that, by the words "use and improvement," the wife took an estate for life in the real estate; and (admitting the devise to her to be within the Rev. Sts. c. 62, § 4, which the court did not decide) that the statute

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did not enlarge her estate to a fee, as it clearly appeared, by the will, that the devisor intended to convey a less estate.

Trustees under a will being authorized and empowered "to grant and sell the whole or any part" of the testator's "estate real or personal, with full power to execute any deed or deeds effectual in law to pass a complete title thereto;" — it was held, that the legal estate did not vest in the trustees.

A testator gave his wife the use and improvement of one third of his real estate, together with certain personal estate, during her life, and the income of certain other personal estate, during her widowhood, and gave the residue, &c., of his estate, real, personal, and mixed, to trustees, in trust to manage, &c.. and to pay over quarterly, to the several beneficiaries under the will, the rent, income, and interest of the said estate, including and embracing that the use whereof was devised to his wife; — it was held, that the trust did not extend to and include the real estate, the use and improvement of which was devised to the wife.

Where a petitioner for partition alleged a seizin in fee, and, upon the facts as agreed by the parties and submitted to the court, it appeared that the petitioner's interest was only for life, the petition was amended so as to conform to the opinion of the court, and judgment for partition awarded accordingly.

This was a petition for partition, in which the petitioner alleged, that, as one of the devisees under the will of her late husband, Windsor Fay, deceased, she was seized in fee of an undivided third part of all the real estate of which he died seized and possessed, in common with the respondents, who were the other devisees under the will. The respondents pleaded that they were sole seized, and issue was joined on such plea.

The cause was submitted to the court upon an agreed statement of facts, from which it appeared, that the petitioner was the widow of Windsor Fay, late of Boston, deceased, who died seized of the several parcels of real estate described in the petition; that Eliza, one of the daughters and devisees of the testator, died February 2d, 1843, leaving one child; that the testator died May 28th, 1844, having made the will alluded to, which was duly proved, approved, and allowed; and that the daughter of Eliza died December 31st, 1844, an infant, unmarried and without issue, leaving her father alive.

The material parts of the will, upon the construction of which the questions arose, which were decided in the case, are as follows:

1. "I will, order, and direct all my just debts to be paid, as soon after my decease as conveniently may be, hereby

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recommending to my executors hereinafter named, to sell off my shipping and other property, abroad and at risk, and all other property not suitable for permanent investment, as soon as it can be done to advantage, and to cause the same to be converted into money or some safe, secure, and permanent investment.

2. "I give to my honored father, John Fay, and mother, Lavina Fay, now residing in Fitzwilliam, New Hampshire, the use, rents, and improvement of all the land, dwelling-house, and farm, which I own in said Fitzwilliam, during their joint lives and the life of the survivor, they to pay the taxes thereon and keep the same in tenantable repair, and I do further will and order, that my said executors shall release them from all liability for prior rents of said place, or any other claims I may hold against them.

3. "I give, devise, and bequeath to my dear wife, Dorcas Fay, the use and improvement of one third of all my real estate, except the farm above referred to, which, after the decease of the survivor, I do hereby give to my two sons William C. Fay and Francis W. Fay, to be equally divided between them, to their heirs and assigns forever. I give also to my said wife Dorcas all the household furniture in my house and family stores therein contained, the said furniture during life, and at her decease to be equally divided among my daughters herein named; I also give my said wife pew No. 56 in the Rev. Mr. Mott's meeting-house, in Boston; and, wishing amply to provide for my said wife, during widowhood, if she shall survive me, I do further give her, so long as she shall remain my widow, the income of one third part of all my personal estate, to be quarterly paid her by my trustees hereinafter named, during life, if she shall so long live my widow, but in case of her second marriage, the said income so made payable as aforesaid is to fall into the residue of my estate, to be paid over and distributed in manner and form as provided in the residuary clause hereinafter set forth, and the foregoing provisions for my said wife, which I have reason to believe are ample, are to be taken and

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considered in lieu and bar of all right to dower or thirds or other claim on my estate.

4. "I give to my daughters Lucinda Fay, Eliza Fay, and Helen Maria Fay, the sum of one thousand dollars each, to be paid them on their marriage or arrival at twenty-one years, whichever first may happen.

5. "I give my son Francis W. Fay the sum of four thousand dollars, to be paid him on his arrival at the age of twenty-one years.

6. "The residue and remainder of my estate, real, personal, and mixed, be the same more or less, or wherever to be found, of which I may die seized or possessed, or entitled so to be, I do give, devise, and bequeath the same to my son William C. Fay, and William A. Hyde, and to the survivor of them, and to his executors and administrators, but in trust to and for the several trusts, uses, and purposes hereinafter expressed and declared, and none other:

"In trust to manage the real and personal estate, and from time to time to receive and collect the rents and income thereof, and after making all needful repairs and deducting all expenses, including insurance, and all other reasonable charges necessarily incident to said trust: then,

"In trust to pay over quarterly to my said wife, Dorcas, the income and interest of one third part of my said personal estate [ex]clusive of the legacies aforesaid, during the term of her widowhood:

"In trust, in the second place, to pay over quarterly the rent, income, and interest of the said residue of my estate, including and embracing that, the use whereof is devised to my wife during widowhood (when the same shall fall in) to my several children, Dorcas C. Smith, wife of Nathaniel P. Smith; Caroline Pond, wife of Sabin Pond; Mary H. Brewer, wife of Nathaniel Brewer; Lydia Ann Robbins, wife of Henry Robbins; Lucinda Fay, Eliza Fay, Helen Maria Fay, William C. Fay, and Francis W. Fay, to be equally divided between them, and in case of the decease of either of my said children, without children or lawful issue, I

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then will, that the income and interest so given as aforesaid shall, in like manner, be divided among the survivors; but in case my said children die leaving issue, then the capital of such deceased child's share shall be equally divided among such issue, share and share alike, to their heirs and assigns forever.

"And it is expressly my will and intention, that the said several shares of income and interest growing and arising out of the trust fund or property aforesaid, and made payable to my daughters, through the agency of the trustees, as aforesaid, should be paid to my daughters, upon their own separate order or receipt, to be severally signed by themselves, free from the control or interference of any husband or husbands they now have, or may in future have, and not in any way to be subject to the debts of any such husband or husbands, or to be liable upon any attachment, trustee process, judgment, or execution, and which said shares of income and interest, as aforesaid, and also the said capital, are hereby expressly declared inalienable, and not subject to sale, mortgage, lien or any other incumbrance whatsoever, by my said daughters, or any husband or husbands they may have.

7. "And I do hereby authorize and empower my said trustees, or the survivor of them, to grant and sell the whole or any part of my estate, real or personal, with full power to execute any deed or deeds effectual in law to pass a complete title thereto, at and for such prices as they may deem proper; but the avails thereof are to be by them retained and held for the same uses and purposes as the lands or other property would be held by the trusts before created.

8. "I do hereby nominate and appoint my said son William C. Fay, and William A. Hyde, trustees for all the purposes of this will, and executors of this my last will, and testament, hereby revoking all former wills by me heretofore made."

W. C. Aylwin, for the petitioner, argued, that she was entitled, under the first clause of the will, to a fee in one third of the real estate of the testator, on two grounds:

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1. The testator gives the petitioner the "use and improvement" of one third of his real estate; and the word "use," since the statute of uses, must be presumed to be employed in its technical sense. The struggle in this country has been, to do away with the rule, that an heir cannot be disinherited by implication. See *Lambert* v. *Paine*, 3 Cranch, 97; *Anonymous*, 3 Dallas, 477.

2. The terms "use and improvement" are sufficient, at all events, to give the petitioner an estate for life. It is settled by a long train of decisions, both at law, and in equity, that by these or equivalent terms, such as "income," "ground rents," "rents and profits," an estate for life passes to the devisee. *Maundey* v. *Maundey*, 2 Strange, 1020; *Johnson* v. *Arnold*, 1 Ves. Sen. 169, 171; *Allen* v. *Backhouse*, 2 Ves. & B. 65; *Doe* v. *Willan*, 2 Barn. & Ald. 84; *Reed* v. *Reed*, 9 Mass. 374.

The petitioner being thus entitled to an estate for life, at common law, by force of the words "use and improvement," her interest is enlarged to a fee by the Rev. Sts. *c.* 62, § 4, by which, it is declared, that every devise of land shall be construed to convey all the estate of the devisor therein, unless a different intention clearly appears by the will, which is not the case here.

C. G. Loring & C. B. Goodrich, for the respondents, argued, that the petitioner did not take a fee under the will.

1. The terms, in which the devise is made, are not apt and sufficient, of themselves, to carry a fee. When words are used, which have an acquired meaning, they are presumed to be used in that sense; and the words here, according to their acquired meaning, import no greater estate than for the life of the devisee. If a testator uses words, which have a legal signification, such words are held to express his intent. 2 Jarman on Wills, 170. Here there is nothing to show an enlarged meaning; and there are considerations which indicate the contrary. *Cook* v. *Holmes*, 11 Mass. 531; *Bowers* v. *Porter*, 4 Pick. 198.

2. The fourth section of the Rev. Sts. *c.* 62, is not appli-

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cable to enlarge the estate of the petitioner, because the devise of a life estate to her is not in express terms. See *Fuller* v. *Yates*, 8 Paige, 326. But, conceding that the statute applies, it is not to operate, provided it clearly appear by the will, that the devisor intends otherwise; and that is evident, in the present case, from a variety of considerations. The terms "use and improvement" import only a limited enjoyment. *Bowers* v. *Porter*, 4 Pick. 204. So of the phrase "freely to be possessed and enjoyed." *Goodright* v. *Bacon*, 11 East, 220. Again, the terms of the devise do not come within the language of the statute. The latter speaks of a devise of land; the language here is the "use and improvement" of land: and, in the definition of this term in Rev. Sts. *c.* 2, use and improvement are not included. There are other provisions of the will, also, which indicate the intention of the testator in this respect. He intended that his property should not go out of his family; and this intent is to govern, because it is plain and clear, and because it is the last. *Bradstreet* v. *Clark*, 12 Wend. 602, 664.

Whenever the testator intends to give a greater estate than for life, he uses words properly expressive of that intent. All the provisions may be reconciled by supposing the petitioner to be beneficially interested for her life. The intent is to be gathered from the whole will; and if a particular intent is opposed to the general, the former must yield. *Hawley* v. *Northampton*, 8 Mass. 3; *Cook* v. *Holmes*, 11 Mass. 528; *Smith* v. *Bell*, 6 Peters, 68.

3. The clause, authorizing a sale by the trustees, either created a fee in them, or, at all events, invested them with such a power of sale and disposition, as to preclude the petitioner from partition. A devise to executors, with a power tc sell, vests a fee in them, without words of inheritance. *Bradstreet* v. *Clark*, 12 Wend. 662, 663. In this case, there is substantially a devise to executors, with a power to sell; the trustees have power to manage the estate, make repairs, &c., which indicates something more than a naked power If not in terms a devise, with power to sell, but a mere power

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to sell, there are circumstances which are quite equivalent to express terms. *Schaube* v. *Jackson*, 2 Wend. 1. But, further, if the petitioner is entitled for life or in fee, she cannot have partition during the continuance of the authority of the trustees to sell; their duties being inconsistent with any such claim on her part. See *Claggett* v. *Hardy*, 3 N. H. 147; *Dawes* v. *Swan*, 4 Mass. 208; Lewin on Trusts, 239; *Nash* v. *Cutler*, 19 Pick. 67; 4 Kent (5th Ed.) 540.

Aylwin, in reply. The devise to the widow is specific, and not merely beneficial. The testator was not *inops consilii*. He knew how to create an estate for life. He does so in the devise to his father and mother. If, taking the whole will together, the petitioner is entitled to a fee, the court will not cut down her estate by a general residuary clause. The power to sell would apply as well to the devise to the father and mother as to the petitioner. If the testator intended to keep his estate in his own family, he has not used sufficient terms for the purpose; for one ninth of the whole has already gone, by the death of an infant grandchild, to the father of that child, who is not of the blood of the testator.

Forbes, J. This is a petition for partition. The petitioner alleges that she is seized in fee of the several parcels of real estate described in her petition. The seizin of the petitioner is denied by the respondents, who contend that she has no legal estate in the premises. All parties claim title under the will of Windsor Fay, the late husband of the petitioner, and their rights depend upon the true meaning and construction of that will. The will is not drawn with legal precision, and in several particulars, the intention of the testator is not free from doubt. One of the most embarrassing of the duties, which the court are called on to perform, is to gather their real meaning and intent from writings, the object of which is either imperfectly conceived by the writer, or obscurely and unskilfully expressed. In the construction of wills, it is a well settled general rule, that the intention of the testator shall govern, and the intention is to be collect

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from the whole will, rather than from an isolated clause or expression. But as no two wills are precisely alike, cases frequently arise, in which but little aid can be derived from previous decisions; and the intention, when ascertained, is sometimes liable to be controlled by technical rules and the force of technical expressions.

The first clause in this will provides for the payment of the debts of the testator, and directs the sale of a certain description of property, with a view to a permanent investment. The second clause gives to the father and the mother of the testator, and the survivor of them, a life estate in the farm in New Hampshire; it directs the executors to release them from all claims of the testator, for rents or otherwise; and it imposes upon them the burden of taxes and repairs. The principal questions have arisen upon the provisions contained in the third and sixth clauses of the will.

The third clause is as follows. [Here the judge recited the clause as above, p. 95.]

In the construction of this clause the counsel for the petitioner contends:

1. That at common law, it would be held to be a devise of a freehold estate for the life of the petitioner; and to this point several authorities were cited.

The use and improvement of real estate, by necessary implication, imports the exclusive possession and occupancy; and the court entertain no doubt of the correctness of this construction of the devise.

2. That if it was a devise of a freehold estate at common law, then, by force of the statute, it must be held to be a devise of an estate in fee.

The will was made a few months after the revised statutes went into operation, and is therefore to be construed with reference to the provisions of that code.

The petitioner relies upon the fourth section of the sixty-third chapter of the Rev. Sts., which provides, that "every devise of land, in any will hereafter made, shall be construed to convey all the estate of the devisor therein, which he

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could lawfully devise, unless it shall clearly appear by the will, that the devisor intended to convey a less estate."

The exact language of the statute is not found in this clause of the will, this not being, in terms, a devise of land; but assuming that the statute is applicable, the question arises, whether it does not clearly appear by the will, that the testator intended to convey an estate less than a fee. The proviso contained in the foregoing section regards the intention of the testator exclusively. The legislature have not required that the intention should be declared in express terms; but to avoid the danger of defeating it, by any inflexible rule of law, they have left such intention to be gathered from the will by a comparison of its several provisions and a clear deduction from them. The inference must be clear and satisfactory to the mind, and it may be drawn from particular provisions, inconsistent with an intent to give a fee, or from the general import, scheme, and object of the will. Wills being frequently made by persons unacquainted with the technical language of the law, it sometimes happened that the intention of the testator was defeated by the omission of apt words of limitation. It was the design of the legislature to remedy this evil, and they are supposed to have proceeded on the hypothesis, that in a large majority of cases, in which a less estate is not named, testators intend to give a fee; and as a general rule, presumptions in favor of the larger estate are safer, and better calculated to give effect to the intention of devisors. But while the legislature changed the rule, they were careful not to fall into the opposite error, by requiring estates less than a fee to be created in express terms; and the court, it is believed, will promote the object of the legislature, by extending the proviso in this section to all cases, in which the intent to give an estate less than a fee can be justly and fairly inferred from the provisions of a will.

In this case, the testator evidently was aware that in the absence of a testamentary disposition of his property, the petitioner would be entitled to a life estate in the realty, by

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way of dower; and the several devises and bequests are made to her expressly in lieu of dower, as well as in satisfaction of all other claims on the estate. In ascertaining the duration of the estate devised, it is impossible to keep out of view the purpose for which the devise was made, and the analogy which existed in the mind of the testator between the two estates; that is, the estate created by the will, and the estate for which it was intended as a substitute. This arrangement raises a probability, at least, that the testator intended to give a life estate only.

This clause contains a bequest to the petitioner of certain personal property during her life, and of the income of other personal property during her life or widowhood; it also contains the expression of a wish to provide amply for the petitioner, but only during her widowhood. The testator had the entire disposal of his personal property, but not of his real estate; and in the absence of any motive to the contrary (and none is disclosed by the will), it is not to be presumed that the testator, while anxious to restrict the petitioner, in the enjoyment of the income from the personal property, to the period of her widowhood, intended to give her a fee in the real estate. It is much more probable, that if the testator had possessed the power, he would have imposed upon the devise of the real estate conditions similar to those which he annexed to the bequest of the income from the personal estate.

But further, it cannot be inferred from this will, that the testator was ignorant of the terms of art, which are appropriate, and frequently necessary to create an estate in fee. The first sentence of the third clause furnishes evidence to the contrary, for the farm in New Hampshire, after the death of the father and mother of the testator, is therein given to two of his sons, "to be equally divided between them, to their heirs and assigns forever;" and similar language is to be found in the sixth clause of the will. In this view, the omission of words of limitation in the devise to the petitioner is indicative of an intention to give to her an estate less than a fee.

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The terms, in which the devise to the petitioner is made, are somewhat significant. This is not a devise, in terms, of one third part of the land, or of the real estate of the testator, but of the *use and improvement* of a third part. It was, indeed, contended for the petitioner that the word "use" was to be taken in its strictly legal and technical meaning. But we perceive no satisfactory reason for such a construction; its collocation in the sentence and its connection with the term "improvement" lead to the conclusion, that both words were used by the testator in their more general and popular acceptation, and that they refer to a temporary occupancy of the land, rather than to an estate in it, coupled with the power of alienation. These words are not, ordinarily, selected to convey a permanent interest in land, nor is such their natura. import or meaning. In the case of *Barnes* v. *Porter*, 4 Pick. 204, C. J. Parker said, that "the use of the word *improvement* may have a considerable tendency to show that a fee simple was not intended to be given;" and the same remark, we think, is applicable to the word "use," as it stands in this clause of the will. A different construction of the terms here used, in violation of the common use of the language, may sometimes be permitted, in order to give effect to the evident intent of a testator; but after all, it is a departure from the ordinary force and effect of the terms, and to be resorted to for the purpose of promoting, not for the purpose of defeating, the apparent objects of a will. For these reasons, connected with the general design and objects of the testator, as disclosed in this will, the court are of opinion, that the petitioner is entitled to an estate for life in the premises, and not to an estate in fee.

But on the supposition that this might be the true construction of the third clause, if it stood alone, the respondents contend, that this clause is controlled by other parts of the will, and that the legal estate is thereby vested in the trustees. In support of this position, they rely principally upon the seventh clause, which is as follows: "And I do hereby authorize and empower my said trustees or the suc-

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cessor of them to grant and sell the whole or any part of my estate, real or personal, with full power to execute any deed or deeds effectual in law to pass a complete title thereto, at and for such prices as they may deem proper; but the avails thereof are to be by them retained and held for the same uses and purposes as the lands or other property would be held by the trusts before created."

The trusts referred to are created by the sixth clause, and embrace "the residue and remainder" of the testator's estate, undisposed of by the preceding clauses, among which is the devise of real estate to the petitioner. There appears to be a well settled distinction between a devise of land to executors to sell, and a devise that executors shall sell, or that land shall be sold by them. A devise of the first description gives a power coupled with an interest, and the estate passes to the executors; but the latter are instances of a naked power. It has been held, and is probably the better opinion, that a devise of the land to be sold by the executors confers a power without any interest. 4 Kent, (5th Ed.) 320. And if, upon a just construction of the will, the power to sell can be held to extend to the real estate devised to the petitioner, —a point upon which we give no opinion,—still we do not perceive any necessary implication by which the legal estate is vested in the trustees. In the case of *Bradstreet* v. *Clark*, 12 Wend. 602, —an authority much relied on by the respondents, — there was a devise to the executors, in terms, as joint tenants and the opinions of two senators in *Shaube* v. *Jackson*, 2 Wend. 1, are not very satisfactory evidence of the law, especially as one senator repudiated the ground upon which the other senator had based his opinion; and the opinions of both senators are in conflict with the doctrine of the chancellor, and the decision of the judges of the supreme court of the state. 7 Cow. 187.

It was said in the argument for the respondents, that the following provision was equivalent to a declaration that the petitioner was interested in the real estate as *cestui que trust*, viz. "In trust, in the second place, to pay over quarterly the

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rent, income and interest of the said residue of my estate, including and embracing that the use whereof is devised to my wife." And if this were the whole of the provision, it would certainly countenance that view of the case, inasmuch as rent is properly incident to real, and not to personal estate. But upon a comparison of the whole clause with other parts of the will, we think that there can be no ground for the inference. The third clause gives to the petitioner the *income* of one third part of the personal estate during her widowhood, and provides that, upon her marriage, this income shall fall into the residue of the testator's estate, and shall be disposed of in the manner thereinafter to be set forth in the residuary clause. In the residuary clause, and immediately preceding the declaration above cited, the trustees are directed to pay over to the petitioner, quarterly, the income and interest of one third part of the personal estate, during the term of her widowhood; and to render the sentence, cited and commented upon by the respondents, perfect, the words "during widowhood, when the same shall fall in," are to be added. But it was contended that either the word "rent" or the words "during widowhood" must be rejected on the ground of repugnancy. In our opinion, such a construction is not necessary, or even plausible. The clause embraces "income and interest," as well as "rent;" and these terms may be taken distributively. Unexplained, the estate, the use of which was given to the wife, might be personal or real: if real estate, the rent of it was to be included, if personal, the income. By adding the words "during widowhood;" a reference to the income becomes manifest. These words were evidently added by design, and by the use of them, the meaning of the testator is rendered clear and definite, which otherwise might have been equivocal. In the judgment of the court, the trust does not extend to the real estate which was devised to the petitioner.

Another objection was made by the respondents. It was said that the power to sell embraced the estate devised to the petitioner; and as the power might be executed at any time

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it left an estate not fit for partition. Whether the power to sell extends to the estate devised to the petitioner or to the remainder, or however else it may be limited, we do not think material to the decision of the present case. If such a power exists, it does not preclude the right of partition. The petitioner is, in any view, seized of an estate which may continue during her lifetime, and, by the provisions of the statute, (Rev. Sts. c. 103,) is entitled to partition. If the power to sell exists, it may never be executed; and certainly it is not to be presumed, that the trustees would sell without a due regard to the interests and convenience of the petitioner as well as of the other devisees.

The petition must be made to conform to the views of the court by an amendment, after which, judgment for partition may be entered.

Benjamin Blaney *vs.* Nancy Blaney & others.

The rule, established in England, — that residuary devises are to be regarded as specific, on the ground, that a testator can only dispose of the lands owned by him, at the time of making his will, — if it ever was in force here, was abrogated by the Rev. Sts. c. 62, § 3, by which testators are enabled to dispose by will of subsequently acquired real estate.

Where the estate of a devisee is taken for the dower of the testator's widow, the right of such devisee to contribution, under the statute of 1839, c. 96, is the same that it would have been under the Rev. Sts. c. 62, §§ 25, 26, if the estate devised to him had been taken for the payment of the testator's debts.

A residuary devisee, whose estate is taken for the dower of the testator's widow, is not entitled to contribution from the other devisees, under the statute of 1839, c. 96.

This was a bill in equity, brought by the plaintiff, as the residuary devisee and legatee of Henry Blaney, deceased, against certain of the other devisees and legatees, to compel them to contribute, in proportion to their respective interests under the will, to make up the loss sustained by the plaintiff, by reason of the refusal of the widow of the testator to

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accept the provision made for her in the will, and the consequent assignment of dower to her in the estate which was devised to him.

The material facts, as they appear by the bill and answer, on which the cause was heard, are as follows:

Henry Blaney, of Boston, made his will on or about the tenth of June, 1842, and died in September, 1844. The will was regularly proved, approved, and allowed, November 18th, 1844, and the plaintiff and Lemuel Capen, one of the defendants, who were named as executors in the will, took upon themselves the execution thereof, in the usual manner, by virtue of letters testamentary.

The testator, at the time of making his will, and also at the time of his decease, was the owner and in possession of a lot of land, with a brick dwelling-house thereon, situated on Temple Street; of another lot of land, with a brick dwelling-house thereon, situated on Common Street; of a third lot of land, with two brick dwelling-houses thereon, situated on Washington Street; and of two lots in Mount Auburn Cemetery. He was also possessed of personal property, at the time of his death, which was appraised at four thousand nine hundred and eighty-eight dollars and thirty-three cents; of which, after payment of debts, &c., a balance remained of two thousand six hundred and two dollars and nineteen cents.

The testator, by the *first* clause of his will, directs the payment of debts and funeral expenses; by the *fourth*, *fifth*, *sixth* and *seventh*, he gives annuities for life to four persons, amounting in the whole, whilst all the annuitants live, to two hundred and fifty dollars a year, payable by his executors; by the *ninth*, he gives specific legacies of one hundred dollars each to two persons; and by the *eleventh*, he names his executors. The other clauses, namely, the second, third, eighth, tenth and twelfth, are as follows:

"*Second.* To my beloved wife, Caroline Blaney, I give and bequeath the sum of two hundred dollars a year during her natural life, to be paid her by my executors in equal

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semiannual payments, the first payment to be made in six months after my decease. I also give her the bedstead, bed, and bedding, which she now uses, and all her wearing apparel, trunks, and drawers. The above legacy is given to my wife in lieu of all claim of dower in the real estate of which I may die seized, and in full satisfaction of all claims on my estate."

"*Third.* I give, devise, and bequeath to Nancy Blaney, widow of my late brother Samuel, my house and land in Common Street, in said Boston, to have and to hold the same to her during her natural life, she paying the taxes and keeping the same in repair, and, after her death, I give, devise and bequeath the same to her children Charles and Anne, during their joint lives, and, after the death of either of them, to the survivor during his or her life, they paying the taxes and keeping the same in repair, while they hold the same; and, after the death of the survivor, I give, devise and bequeath the same to my nephew, Benjamin Blaney, to have and to hold the same to him, his heirs and assigns forever. But, if the said Nancy Blaney prefers not to occupy or collect the rents of said house and land, I hereby direct my executors to collect the rents and take charge of the estate during her life, and to pay her the amount of rents received from the same, deducting the taxes and twenty-five dollars for repairs, insurance, &c."

"*Eighth.* I give and devise to my niece, Mrs. Mary Capen, wife of Rev. Lemuel Capen, of South Boston, my house in Temple Street, to have and to hold the same to her during the term of her natural life, she paying the taxes assessed thereon, and keeping the same in repair."

"*Tenth.* I give, devise, and bequeath to my nephew, Benjamin Blaney, son of my late beloved brother Joseph, my pew in Hollis Street church, and all my interest and estate in tombs at Mount Auburn, and all the rest, residue, and remainder of all my estate, property, and effects, of every description, real, personal, and mixed, of every description, not herein before disposed of, to have and to hold the same

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to him, his heirs, executors, administrators, and assigns forever."

"*Twelfth* I hereby authorize and empower my said executors to sell and dispose of any or all the real estate, of which I may die seized, and not specially devised, in such manner as they may think fit, and, after paying the other legacies, to invest the proceeds of any real estate they may sell, in good and productive securities, in such manner as to secure the payment of the annuities hereby given; or they may collect the rents of the real estate, and pay the annuities out of them, if they should prefer that course."

Caroline Blaney, widow of the testator, in November, 1844, renounced the provision made for her in the will, and claimed dower in the real estate; and, on her application to the judge of probate, commissioners were appointed, who, on the 11th of December, 1844, set off to her for her dower a part of the estate on Washington Street. The commissioners appraised the estate on Temple Street at eight thousand dollars, and the net annual income thereof at four hundred and thirty dollars; the estate on Common Street at seven thousand dollars, and the income at three hundred and fifty dollars; the estate on Washington Street at nineteen thousand dollars, and the income at seven hundred and ten dollars; and that portion of the latter, which was set off as dower, at eleven thousand three hundred and thirty-three dollars, and the income at four hundred and ten dollars. The doings of the commissioners were approved by the judge of probate, and dower was assigned accordingly, on the 16th December, 1844. The dower being wholly assigned in that portion of the testator's real estate, which passed under the residuary clause to the plaintiff, he agreed with the widow to receive from him, in lieu thereof, an annuity of five hundred and fifty dollars, during her life, which he covenanted to pay, and which he had paid, so far as the same had become due.

The bill was brought only against the devisees of the real estate on Common and Temple Streets; the plaintiff waiving all claim against the annuitants and legatees, and agreeing,

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if contribution should be decreed, that their proportions thereof should be charged to him.

S. E. Sewall, for the plaintiff. The sole question is, whether a general residuary devisee is entitled to contribution. The *St.* of 1839, *c.* 96, § 1, seems conclusive. It provides that when the estate of one devisee shall be taken for the widow's dower, all the other devisees and legatees shall contribute their proportions of the loss to the devisee whose estate is so taken. A residuary devisee is as much within the words of the statute as a specific devisee. The plaintiff is therefore entitled, unless excluded by some principle of law. The only suggestion, that can be made, is, that the testator intended the dower to be a charge on the residue. But such does not appear to have been his intention. He charged the residue with nothing more than the payment of an annuity of two hundred dollars to the widow; and he must be presumed, therefore, to have intended that the devisee of the estate on Washington Street should have the benefit of it subject to that annuity, as much as that the other devisees should have the benefit, subject to the charges thereon, of the estates devised to them respectively.

Debts and legacies are to be paid at the charge of the residue; because what is thus given is only what is left after such payments. According to the terms of the bequest to the widow, in lieu of dower, the annuity of two hundred dollars was to relieve the whole of the testator's real estate of which he might die seized, — that devised by the residuary clause, as well as that specifically devised, — from all charge of dower, and to be in full satisfaction of all claims on his estate. The residuary and other devisees were thus put upon the same footing by the will; and if the statute had intended to discriminate between them, it would have contained apt words for the purpose.

It is the rule, in England, that where land is devised by a residuary clause, it is to be considered as specifically devised; for the reason, that a will only operates on land owned by the testator, at the time it is made, and therefore a residuary

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clause is in fact a gift of the land so owned. 2 Jarman on Wills, 547; *Mirehouse* v. *Scaife*, 2 Mylne & Craig, 695. The same doctrine has also been recognized in this commonwealth, in the case of *Wyman* v. *Brigden*, 4 Mass. 154, in which Parsons, C. J., said, that "a devise of land is, in all cases, considered a specific devise, whether devised by a specific or general description, to a particular devisee, or to the residuary devisee."

Residuary devisees do not stand upon a different footing from others in this respect. There may be cases, in which residuary and even pecuniary legatees will be entitled to contribution; as, for example, in the case of *Dyose* v. *Dyose*, 1 Peere Wms. 305, the reason of which applies strongly to the present case. There, the testator, at the time of making his will, had a general understanding of the state and condition of his property, and made his will accordingly; afterwards his property underwent a change, the consequence of which was a deficiency of assets; and the court of chancery, considering the special circumstances of the case, ordered an account to be taken, and allowed the residuary legatee to come in, *pari passu*, with the other legatees. This case was found fault with by lord Thurlow (*Fonnereau* v. *Poyntz*, 1 Brown Ch. 478,) but he never made any decision against it. Other cases may also be mentioned, in which an exception to the general rule occurs, when the reason of the rule fails; as, in the case of *Biederman* v. *Seymour*, 3 Beavan, 368, in which the heir, who had been obliged to satisfy the demands of creditors, was allowed contribution from the devisees. The heir stands very much in the situation of a residuary devisee or legatee; but yet the rule was held not to apply to him, where it was the manifest intention of the testator to put him upon the same footing with devisees and legatees.

In New York, it is provided by statute, (2 Rev. Sts. p. 65, § 49), that a child of the testator, born after the making of the will and not mentioned in it, shall be entitled to a share of the estate, to be contributed by the several devisees and

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legatees, in proportion to their respective interests; and in *Mitchell* v. *Blaine*, 5 Paige, 558, the chancellor says, that the statute makes no distinction between general, specific, and residuary legatees, and that no such distinction was intended. Consequently, a legacy, or devise in lieu of dower would be included. So, in the present case, it is contended that the plaintiff is within the words, meaning, and reason, of the statute of 1839, *c.* 96; and that a different construction would be contrary to equity.

W. C. Aylwin, for the defendants. By the common law, the defendants are not bound to contribute; neither are they by the statute of 1839, *c.* 96, when rightly understood. This statute is to be considered, *first*, in connection with the will, and, *secondly*, in connection with the other statute laws relating to the same subject.

1. The statute contains a proviso, that no devisee or legatee shall be held to contribute, "who may be exempted therefrom by the provisions of the will." By the terms of the will, in the present case, it is manifest, that the testator intended to exempt the specific devises from contribution. He authorizes his executors, by the twelfth clause, to sell any or all of the real estate, of which he might die seized, and which was *not specially devised*, and to invest the proceeds thereof for the payment of the annuities; thus exempting the specific devises from any charge on that account. Besides, the intent is further manifested, negatively, not to impose any burden of contribution upon the specific devisees, by the charge imposed upon them, affirmatively, to pay the taxes and make necessary repairs, and nothing more.

2. The statute of 1839, *c.* 96, taken in connection with the other provisions of law relating to this subject, instead of furnishing a ground for the plaintiff, is conclusive for the defendants. That statute can only be regarded as an addition to the Rev. Sts. *c.* 62, §§ 23, 25, 26, — as forming a part of the same system, — and as extending the obligation of contribution to cases, in which the estates of devisees are taken for dower; but there is no ground for supposing, that the

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legislature intended to make devisees liable in any different manner, or to any greater extent than they were before; and, according to the construction heretofore given to the language of the above mentioned sections, residuary devisees are not entitled to contribution.

The English cases relating to the marshalling of assets, which have been cited, are not applicable. *Hays* v. *Jackson*, 6 Mass. 149; *Humes* v. *Wood*, 8 Pick. 478; *Hubbell* v. *Hubbell*, 9 Pick. 561. At common law, no claim of this kind could be made, but upon the ground of a warranty. *Harbert's case*, 3 Co. 12.

METCALF, J. The plaintiff's claim is founded on *St.* 1839, *c.* 96, § 1, which is in these words: "Whenever the estate of one or more devisees under a will shall be taken or assigned, by the judge of probate, for the dower of the widow of the testator, or be set out to her upon a judgment rendered in an action of dower at common law, all the other devisees and legatees shall contribute their respective proportions of the loss to the person from whom the estate is so taken or set out, so as to make the loss fall equally upon all the devisees and legatees, in proportion to the value of property received by them under the will: Provided, that no devisee or legatee shall be held to contribute as aforesaid, who may be exempted therefrom by the provisions of the will."

In giving a construction to this statute, it is proper to take into consideration the previous statutes and the common law.

By *St.* 1783, *c.* 24, § 18, it was provided, that when any chattels or real estate, given to any person by last will, should be taken in execution for the payment of the testator's debts, or should be sold therefor according to law, "all the other legatees, devisees and heirs" should refund their proportional part of such loss to the person from whom the bequest should be so taken away, and that he might maintain a suit at law to compel such contribution. The claimants under a will, who were by this statute made liable to contribution, are described in the same terms that are used in *St.* 1839, *c.* 96, namely, "*all* the other legatees and devisees." Yet

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we find in the earliest cases which arose under *St.* 1783, *c.* 24, § 18, that it was contended by counsel, that this section should not be taken literally, but should be so construed as not to affect the preëxisting common law doctrine, that specific devises and legacies shall be exempted from abatement when the other devises and legacies are sufficient to pay the testator's debts. See 2 Dane Ab. 250, *et seq.* In *Hays* v. *Jackson*, 6 Mass. 149, this construction was authoritatively settled by the court; and it was recognized and confirmed by the Rev. Sts. *c.* 62. By §§ 25, 26, of that chapter, it is enacted that "when any estate, real or personal, that is devised, shall be taken from the devisee, for the payment of the debts of the testator, all the other devisees and legatees shall contribute their respective proportions of the loss to the person from whom the estate is taken;" provided, however, that "if the testator shall, by making a specific devise or bequest, have virtually exempted any devisee or legatee from his liability to contribute with the others for the payment of the debt, or if he shall, by any other provision in his will, have prescribed or required any appropriation of his estate, for the payment of his debts, different from that prescribed in the preceding section, the estate shall be appropriated and applied in conformity with the provisions of the will." And by § 27 it is declared that the foregoing provisions shall not impair, or in any way affect, the liability of the whole estate of the testator for the payment of his debts, but shall apply only to the marshalling of the assets, as between those who hold or claim under the will.

By the established rule of marshalling assets, specific devises and legacies are not to be taken for payment of the testator's debts, until the general devises and legacies are exhausted. A residuary legacy is not regarded as specific, and a residuary legatee cannot call upon the other legatees to abate. 6 Mass. 151; 3 Wooddeson, 532; Preston on Leg. 359; 1 Roper on Leg. (1st Amer. ed.) 284; 2 Jarman on Wills, 546, 547. If, then, the land devised to the plaintiff

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had been taken for payment of the testator's debts, it is very clear that he would have had no claim on the other devisees and legatees for contribution. It is equally clear that he has no such claim, if the devise to him is not a specific devise.

Two questions remain. Is the devise to the plaintiff specific? If not, does *St.* 1839, *c.* 96, give him a right to contribution?

1. It seems by the English authorities, that residuary devises have been regarded as specific, on the ground that a testator could dispose only of the lands owned by him when his will was made, and therefore that a residuary devise was a gift of such lands only; and that the lands devised were subject to the rule of marshalling assets, which leaves specific devises untouched, if the general legacies and devises are sufficient, with the other property, to pay the testator's debts. 2 Jarman on Wills, 547. It may well be doubted whether this rule of the English law was ever adopted in this commonwealth. For though Parsons, C. J., seems to have recognized it, incidentally, in *Wyman* v. *Brigden*, 4 Mass 151, cited by the plaintiff's counsel, yet in the subsequent case of *Hays* v. *Jackson*, 6 Mass. 149, he held that a residuary devise, like that which was made to the present plaintiff, could not be considered as specific, within the rule of marshalling assets. And the court, upon a petition for license to sell real estate for the payment of a testator's debts, ordered the estate, given to the residuary devisee, to be sold, before selling that which was specifically devised.

But we are of opinion, that since the Rev. Sts. *c.* 62, § 3, have enabled testators to devise lands acquired after the making of their wills, by clearly manifesting, by their wills, their intention so to do, the English rule above mentioned, if it ever was in force here, can exist no longer.

On inspecting the will under which the plaintiff claims, we cannot doubt the testator's intention to give to the plaintiff all the property not before disposed of by the will. He manifestly had in his mind the possible acquisition of real estate after the making of his will. He made a provision for

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his widow, in lieu of dower in the real estate of which he might "die seized." And after devising and bequeathing to the plaintiff "all the rest, residue and remainder of all" his "estate, property and effects, of every description, real, personal and mixed," not before disposed of, he authorized his executor (who was the plaintiff) to sell and dispose of any or all the real estate (not especially devised) of which he might "die seized." See *Pray* v. *Waterston*, 12 Met. 262.

2. We are of opinion that the plaintiff's right to contribution, under *St.* 1839, *c.* 96, is no greater than it would have been under the Rev. Sts. *c.* 62, §§ 25, 26, if the estate devised to him had been taken for payment of the testator's debts. By those sections, he could not have had contribution from those to whom specific devises or bequests were made; because they would have been virtually exempted, by the testator, from liability to contribute. And under the proviso in *St.* 1839, we hold that all the defendants, whether their legacies and devises are technically specific or not, are exempted from contribution "by the provisions of the will." This exemption results from the nature and effect of a disposition of property by a residuary devise or bequest. Nothing is given by such a devise or bequest, except on a contingency that something shall remain after all paramount claims on the testator's estate are satisfied. The claim of dower, the demands of creditors, the rights of posthumous children not provided for, of children or the issue of deceased children, for whom the testator unintentionally omits to provide, and of other legatees and devisees, must all be satisfied, in the order prescribed by law, before the residuary devisee can take any thing. Whenever, therefore, a testator makes such a devise, without any modification thereof, he, by the necessary legal effect of "the provisions of the will," exempts all other devisees and legatees from contribution to the residuary devisee, towards the loss which he may sustain by the taking, for the dower of the widow, the estate devised to him.

Bill dismissed.

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Eliza O. Brimmer *vs.* William D. Sohier, Executor.

Where the words used in a will, if construed according to their technical force and meaning, would defeat the obvious intention of the testator, such a construction is not to be adopted.

Where a testator, by a residuary clause, devised the residue of his real and personal estate "to the survivors of his brother and sisters," naming them; — it was held, that this was a devise of an estate in common to all the devisees who should survive the testator, with the right of possession immediately after his decease, and not a devise upon a contingency, to the two out of the three persons named who might survive the third.

The effect of a codicil, ratifying, confirming, and republishing a will, is to give the same force to the will, as if it had been written, executed, and published, at the date of the codicil.

Where a will was made before, and a codicil added after, the passing of the revised statutes, it was held, that the will might operate upon after purchased real estate, in the same manner, as if it had originally been made at the date of the codicil.

Under the Rev. Sts. *c.* 62, § 3 which provide for the passing, by will, of after purchased real estate, "if such shall clearly and manifestly appear, by the will, to have been the intention of the testator," it is not necessary, that the intention should be manifested by an express declaration; but it is sufficient, if it can be inferred from the several provisions of the will; and the true question seems to be, whether the testator intended to die testate as to all the property which he might leave, or whether he was content to die intestate as to a part, and to leave it to be distributed according to law.

Wherever there is a devise of the whole estate, or of all the residue of the estate, of a testator, — there being both real and personal estate upon which the will may operate, — an intention to give after acquired real estate may perhaps be justly inferred, unless there be some indication of a different intention to be found in the will.

This was a bill in equity, the nature of which sufficiently appears from the following statement of facts, upon which the cause was submitted.

On the 14th day of March, 1835, George W. Brimmer, Martin Brimmer, Mary Ann Brimmer, and the plaintiff, were the owners in fee of four undivided fifth parts of the wharf and flats in Boston, known as Brimmer's T; the children of Susan Brimmer Inches owned the reversion of the other undivided fifth part, of which their father was and is tenant by the curtesy.

George W. Brimmer died in Italy, September 12th, 1838, having made his will, since duly proved and allowed, bearing date the 25th September, 1837, containing the following provisions:

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"I bequeath all my real estate in Brewer, state of Maine, to the surviving children of my late sister Susan Inches, wife of Henderson Inches."

"To George Brimmer Sohier, son of William D. Sohier, I give two thousand dollars and the residue, unsold at my death, of my portion of real estate lying in Cambridgeport."

"The residue of my real and personal estate in Boston, North Carolina and elsewhere, I give to the survivors of my brother and sisters, Martin Brimmer, Eliza O. Brimmer and Mary Ann Brimmer."

At the time of George W. Brimmer's decease his brother and two sisters were living. His will was proved May 2d, 1839.

On the 18th day of October, 1839, Mary Ann Brimmer died in Paris, having made her will bearing date 14th March, 1835, together with a codicil bearing date 29th September, 1837, which will and codicil have since been duly proved and allowed, 16th March, 1840.

The will after sundry legacies contains the following provisions:

"One moiety of all the residue of my estate real, personal and mixed, wheresoever the same may be situated, I devise and bequeath unto my sister Eliza Oliver Brimmer, to hold during her natural life."

"All the residue of my estate I devise and bequeath unto my brothers, George Watson Brimmer and Martin Brimmer, their heirs and assigns forever, in case they both survive me, otherwise my will is that the brother who shall survive me shall take the whole and entire residue of my estate."

The codicil, bearing date 29th September, 1837, provides for certain legacies, republishes the will and confirms the same, but contains no provision affecting the title to the wharf and flats.

The heirs at law of Mary Ann Brimmer, at her decease, were her brother Martin Brimmer, her sister Eliza O. Brimmer, and the children of her deceased sister Susan B. Inches.

Martin Brimmer died on the 25th day of April, 1847

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having made his will bearing date 31st July, 1840; which has since been proved and allowed.

By this will one moiety of the real and personal estate which belonged to him at his decease was given to Eliza O. Brimmer, for and during her life; and there were provisions in the will, in reference to the residue and the other moiety, not necessary to be set forth in this case.

The will also contains this provision: "If my said sister shall be desirous of becoming the owner of my share, title and estate of, in and to that certain wharf and flats in the city of Boston called and known by the name of Brimmer's T, then I order and direct that the same shall be conveyed to her by the executor of this will, or such person as shall be administrator of my estate with this will annexed, upon being paid the amount of money at which my said share of said wharf and flats shall be appraised under the warrant of the court of probate and entered in the inventory of my estate."

"And said executor or administrator is directed and authorized so to convey my said share of said wharf and flats, and I declare that the deed of said executor or administrator shall effectually pass to the grantee therein named all the estate and share in said wharf and flats which I held or was entitled to at my decease.

"I declare this will shall operate upon real estate of which I shall be, as well as upon such as I am now, the owner."

Martin Brimmer, as above stated, owned one fifth of the wharf and flats in his own right, and whatever other portion thereof, he was at his decease entitled to, was devised under the wills of his brother George and his sister Mary Ann, or as one of the heirs at law of Mary Ann, if she left any portion of the wharf and flats undisposed of by her will, as the plaintiff contends she did.

The interest of the testator in the wharf and flats was estimated in the inventory of his estate to be six-fifteenth parts thereof in possession and two-fifteenth parts thereof in reversion, and its value was estimated at one hundred and

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fourteen thousand three hundred and forty-eight dollars and eighty cents.

William D. Sohier, Esq. was duly appointed executor of the will of Martin Brimmer and notified the plaintiff, in writing, that he was ready and willing to convey to her the title of the testator in the wharf and flats, for the sum of one hundred and fourteen thousand three hundred and forty-eight dollars and eighty cents.

The plaintiff signified to the executor her desire and intent to avail herself of the provision in the will, and to purchase the title of the testator in the wharf and flats, whether the same might be more or less than set forth in the inventory; and requested him to convey to her forty-four-ninetieth parts of the same, which she affirmed to be the whole interest of the testator therein, at his decease, at a price proportionate to that at which the testator's supposed interest and estate was valued in the inventory; which the executor declined to do.

This bill was filed for the purpose of ascertaining the actual title of Martin Brimmer in the wharf and flats, at his decease, and obtaining a conveyance thereof.

The court is to decree the defendant, in his capacity of executor, to convey that portion of the wharf and flats to the plaintiff, of which Martin Brimmer died seized, upon payment of the price at which the same should be valued, according to the terms of his will.

The arguments in this cause were submitted in writing.

W. Dehon, for the plaintiff.

1. The first question is, what estate did Martin Brimmer take under the residuary clause of the will of George W. Brimmer. At the date of this will, and at the time of the testator's death, his brother Martin and his two sisters were living. The testator devised the residue of his estate, wheresoever situated, "to the survivors of his brother and sisters."

This language created a devise, upon a contingency, to the two out of the three persons named, who might survive the third. It was necessarily contingent who would be such

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survivors. The general rule is, that, in a devise to survivors upon a contingency, the words of survivorship refer to, and take effect upon, the happening of the contingency. 2 Jarman on Wills, 651.

In this devise, the parties, who are to take, not only take upon a contingency, but they are to be such as sustain a certain character, that is, they must be survivors of the other; and the rule is, that where property is given to those persons out of a class, who shall, at a future time, sustain a particular character, without a distinct gift being previously made to the whole class, so that the uncertain event forms a part of the original description of the devisees, the interest in such case is necessarily contingent, on account of the person; for, until the particular character is attained, there is no one to answer the description. 2 Fearne C. R. (10th ed.) 136. This case seems to fall clearly within the rule.

If it should be objected, that, upon this construction, the estate would be left undisposed of, until the happening of the contingency, and would consequently descend at law, until the devise should take effect; — it may be answered, first, that the construction in question, if otherwise well sustained, would not be thereby defeated; and, secondly, that the devise might be construed as a gift to the several persons for life, as tenants in common, and, upon the death of either, then to the two survivors; in which case, the three would take as tenants in common with benefit of survivorship in the two, who should survive. 2 Jarman on W. 645, and cases there cited. *Doe* v. *Abey*, 1 M. & S. 428.

2. The next question is, what estate did Martin Brimmer take under the will of Mary Ann Brimmer. The testatrix survived George W. Brimmer. Her will was made March 14th, 1835; the codicil was added September, 1837; and the death of G. W. B. took place in 1838. The estate, therefore, if any, which she derived under his will, including the wharf estate, was acquired by her after the making of her will; and the question is whether such after acquired real estate passed by it.

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The rule of the common law, according to which after acquired real estate would not pass under the will, but would descend to the heir at law, was the law of this commonwealth, until the revision of the statutes, and still prevails, except so far it has been altered by statute. The will was made before the revised statutes went into operation.

By *c.* 62, § 3, it is provided, that "any estate, &c., in lands, acquired by the testator, after the making of his will, shall pass thereby, in like manner, as if possessed at the time of making the will, if such shall clearly and manifestly appear by the will to have been the intention of the testator."

The will is not within the operation of the statute, because the latter is prospective only. *Brigham* v. *Winchester*, 1 Met. 390. But if the codicil, which was made in 1837, after the statutes went into operation, should be held to have abrogated this objection; — then the question is, whether there is clearly and manifestly in the will an intent to pass after acquired real estate.

The intent must be sought in the will itself; and, for this purpose, the residuary clause alone furnishes any evidence. That clause was written in 1835, before the revision of the statutes, and, consequently, at a time, when it was not in the power of the testatrix, or of any one, to devise after acquired real estate; and it is not to be supposed, that she then intended to convey what could not by law be conveyed. When the codicil was added, in 1837, the law had been changed, in this respect, but the testator then inserted no expression of her intention to convey after purchased estate; nor did she, after the decease of G. W. B. in 1838, when she had acquired further real estate, make any addition to her will, expressing any such intention. The fact, that the testatrix, after she had been empowered by law to pass after acquired real estate, by expressing her intention to do so, in her will, made no addition to a will, which was clearly inoperative for that purpose, is quite significant if not conclusive to show that she had no such intention.

But, further, the intent must not only appear by the will;

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it must clearly and manifestly appear, and is not to be presumed or inferred. It must appear, affirmatively, that the testatrix had in her mind, at the time of making her will, or, at all events, at the time of making the codicil, an intent to dispose thereby of such after acquired estate. But neither the will nor the codicil contains a word, or even an allusion, indicating any such idea or intention.

W. Sohier & J. Lowell, for the defendant.

1. It is argued, on the authority of the rule laid down by Fearne, (2 C. R. 136), that, as the will of G. W. B. contained no distinct gift to the whole class (the testator's brother and sisters) immediately preceding the devise to the survivors, the interest was necessarily contingent; and, consequently, that the devisees could only take in the character of survivors. This argument takes for granted, that there is no devise to the whole class; which is in fact the question at issue.

The will is to be construed according to the intent, so far as it can be ascertained from the instrument itself; and if the intent can be clearly perceived, the court will give effect to it, even though the terms, in which it is expressed, might otherwise have a different legal operation. *Homer* v. *Shelton*, 2 Met. 195; *Thellusson* v. *Woodford*, 4 Ves. 329; *Perry* v. *Woods*, 3 Ves. 208. And equity will construe a will against express words to effectuate such intent. *Drayton* v. *Drayton*, 1 Dessaus. 324.

The will being evidently drawn by the testator himself, it is fair to presume, from that fact, in connection with the fact that one sister "of his brother and sisters" had died, that he used the word "survivors" in its natural and popular sense, meaning those of his "brother and sisters" who were then living.

If it should be inferred, however, that the testator did not intend an absolute gift to the three persons named, but that he survivors only should take; it seems to be clearly settled, that all who survive the testator, and fall within the description of brother or sister, would take equally as tenants in

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common. Such an interpretation is well sustained by the rules of law.

This is a general devise of the residue, which not only carries a fee, (*Kellogg* v. *Blair*, 6 Met. 322; *Parker* v. *Parker*, 5 Met. 134,) but implies an intention, on the part of the testator, that the objects of his bounty should take immediately upon his decease, and that his estate should then be divisible between them. *Hill* v. *Chapman*, 1 Ves. Jr. 405.

When no other time is mentioned in the will, for the devisees to take, the courts will consider it to be the time when the will takes effect, namely, at the testator's decease. *Bindon* v. *Suffolk*, 1 Peere Wms. 96; *Stringer* v. *Phillips*, 1 Eq. Cas. Abr. 293; *Taylor* v. *Langford*, 3 Ves. 119; *Perry* v. *Woods*, 3 Ves. 204; *Wadley* v. *North*, 3 Ves. 364; *Jenour* v. *Jenour*, 10 Ves. 562; *Drayton* v. *Drayton*, 1 Dess. 324; *Jackson* v. *Billinger*, 18 Johns. 368, 381.

When words of survivorship are used, they are to be referred to the time of the testator's decease, unless some special intent is shown to the contrary, or, unless a previous interest be given in the subject matter of the devise. *Maberly* v. *Strode*, 3 Ves. 450; *Russell* v. *Long*, 4 Ves. 551; *Cripps* v. *Wolcott*, 4 Madd. 11; *Brown* v. *Bigg*, 7 Ves. 279. Thus, in the case of *Swinton* v. *Legare*, 2 M'Cord Ch. 440, where a legacy was given to one for life, and, after her death, "to the survivors of" her children, it was held, that all the survivors who were living at her death would take.

The words in question were used by the testator to prevent a lapse, which might otherwise have happened by the death of either of his brother and sisters, in his lifetime; and equity, from the earliest period, has construed such words of survivorship as introduced by a testator with that object. *Brown* v. *Bigg*, 7 Ves. 279; *Maberly* v. *Strode*, 3 Ves. 450; *Bindon* v. *Suffolk*, 1 Peere Wms. 96; *Roebuck* v. *Dean*, 2 Ves. Jr. 265. See also *Stewart* v. *Sheffield*, 13 East, 526; *Drayton* v. *Drayton*, 1 Dess. 324.

In many of the cases above referred to, the devisees or legatees were mentioned by name; but, the distinction

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though sometimes adverted to, is not deemed material; and, although most, if not all the cases, relate to legacies, yet the rule is held equally to apply to devises. *Stones* v. *Heurtley*, 1 Ves. Sen. 165; *Perry* v. *Woods*, 3 Ves. 204; *Stewart* v. *Sheffield*, 13 East, 527.

A different construction would leave the residue of the estate undevised, until the death of one of the three devisees; which would be contrary to the well established rule of law, "that every presumption is to be made against intestacy, where a residue is given in terms by a will." *Philipps* v. *Chamberlaine*, 4 Ves. 50; *Maberly* v. *Strode*, 3 Ves. 450; *Earl* v. *Grim*, 1 Johns. Ch. 494; *Fox* v. *Phelps*, 17 Wend. 393. And courts will put no construction on a will so as to create intestacy, if it can be avoided. *Wadley* v. *North*, 3 Ves. 366.

A suggestion was made, in order to obviate this result, that the devisees might "take as tenants in common with benefit of survivorship;" and, in support of this proposition, the case of *Doe* v. *Abey*, 1 M. & S. 428, was cited. But that case was peculiar, — turning upon its own individual merits, — and only applicable to a precisely similar state of facts. See 2 Jarman on W. 656.

If the words "survivors of" should be construed to exclude all but the two who survive the third, as is argued by the plaintiff, then it might follow, that if two of the number had died during the testator's lifetime, or could be supposed to die afterwards at the same moment, the whole residue would remain undevised; as the single survivor is as far from satisfying the description as the three.

The cases contemplated by the rule cited from Fearne are widely different from the present. The devise here should be held, in accordance with the principles already stated, to apply to all the persons named as brother and sisters of the testator surviving at his decease, and to refer to them as a class, and not as survivors of a class. This construction has been given to these very words in *Swinton* v. *Legare*, 2 M'Cord Ch. 440. The general intention of the testator, to

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dispose of his estate at his decease, shown by the residuary clause, ought not to be controlled by the singular expression, by which he mentions the devisees.

The view taken by the defendant is warranted by the terms of the will, and by decisions of the courts, construing similar devises in favor of classes. *Walker* v. *Shore*, 15 Ves. 122; *Daniell* v. *Daniell*, 6 Ves. 297; *Godfrey* v. *Davis*, 6 Ves. 43; *Dingley* v. *Dingley*, 5 Mass. 535; *Vanbrook* v. *Rogers*, 3 Murph. 178; *Knight* v. *Wall*, 2 Dev. & Batt. 125. And it has also been repeatedly held, that all who can answer to the description are to take, when, by the will, the testator intends the property to vest in possession. *Devisme* v. *Mello*, 1 Br. C. 468; *Matchwick* v. *Cock*, 3 Ves. 609; *Cole* v. *Croyan*, 1 Hill Ch. 322.

2. The second question is, whether the real estate acquired by M. A. B., after the making of her will, under the will of G. W. B., descended to her heirs at law, or passed by the residuary clause in her will, by force of the Rev. Sts. *c.* 62, § 3, already cited. The latter will be the case, provided it shall clearly and manifestly appear by the will, that such was the intention of the testator.

It can hardly be doubted, from the terms and provisions of the will, that the testatrix intended to make her brother Martin and her sister Eliza her sole residuary legatees and devisees. It is true, that, if she had died before the revised statutes were passed, the devise would have been inoperative as to the real estate, not from any doubt as to her intention, but in consequence of an inflexible rule of law.

The "clear and manifest intention of the testator," which is made a condition to the passing of after acquired estate, does not require the use of any particular words to denote it; nor does it alter the rule of construction, by which courts infer an intention to dispose of other property; but the clause was rather introduced to qualify the meaning of the word "shall," in the preceding part of the section, and to prevent it from being construed to restrict a testator from excepting

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such after acquired estate from the operation of his will. This is the construction, which has been given in Illinois to an analogous statute, empowering a testator to devise "all the estate which he hath, or, at the time of his death, may have, in any lands," &c.; under which, a devise of the "whole estate real, and personal," was held to indicate an intention to devise all the property which the testator might own at his decease, and to include lands acquired after the making of the will. *Willis* v. *Watson*, 4 Scamm. 64.

The construction, thus contended for, would leave the intent to be ascertained from the general scope of the instrument, upon well settled and familiar principles of law. To consider the residuary clause, in the present case, as ineffectual to pass the estate, would make the interpretation of that clause depend upon the nature of the property which the testatrix happened to have, rather than upon the plain and ordinary meaning, or the well established legal effect and operation, of the words which she has made use of; and, thus, the meaning of a testator would be inferred, not so much from the words of his will, as from the accidental character of his investments. See *Thellusson* v. *Woodford*, 4 Ves. 329; *Perry* v. *Woods*, 3 Ves. 208.

It is clear, that the testatrix did not mean to die intestate, and the cases already referred to show, that every presumption is to be made against intestacy, especially when the will contains a residuary clause.

If the statute provision were so entirely prospective in its operation, as to include only wills subsequently made, the making of the codicil would give the same effect to the will, in the present case, as if it had been made at that time *Washburn* v. *Sewall*, 4 Met. 66. See also *Hill* v. *Chapman*, 1 Ves. Jr. 405. But, even if the codicil had never been made, the statute should be construed to take effect upon the original will alone, the object of it being to give effect to and not to defeat the intention of the testator.

Similar questions have arisen under the statutes of New

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York relating to devises, and have been decided in favor of the construction contended for. See *De Peyster* v. *Clendining*, 8 Paige, 295; *Bishop* v. *Bishop*, 4 Hill, 138.

FORBES, J. This case comes before the court upon an agreed statement of facts. Two questions only have been argued, and submitted for our decision. The first question is, whether Mary Ann Brimmer took any estate under the will of George W. Brimmer. This will is exceedingly brief, and was, apparently, written by the testator, without the aid of professional advice. The first clause contains a bequest of all the estate of the testator in Brewer, in the state of Maine, to the surviving children of his deceased sister, Susan Inches. Then follows a bequest to George B. Sohier. The next and last clause of the will is as follows: "The residue of my real and personal estate in Boston, North Carolina, and elsewhere, I give to the survivors of my brother and sisters, Martin Brimmer, Eliza O. Brimmer, and Mary Ann Brimmer." All the residuary devisees named in the will survived the testator; and after his death, Mary A. Brimmer died, leaving the plaintiff and Martin Brimmer her survivors. Upon this state of facts, the plaintiff contends that Mary A. Brimmer took nothing under the will; that the residuary clause created a devise upon a contingency: that it was a devise to the two out of the three persons named who might survive the third. This construction is based upon the technical meaning and force of the words "to the survivors of my brother and sisters;" and it ought not to be adopted by the court, if it would defeat the obvious intention of the testator. There can be no reasonable doubt of the intention of the testator, that in case but one of the devisees named in the residuary clause should survive him, the estate should vest in such sole survivor. But upon a strict and literal construction of these words, if two of the three had died during the lifetime of the testator, the survivor would not take. It is not a bequest to the survivor, but to persons who shall answer the description of survivors. The construction contended for would give to the devise a very

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extraordinary and anomalous character. It is evident that the three devisees were equally objects of the testator's bounty, in case they should survive him; but this construction would select two out of the three, by lot, as it were, and would give the estate to them upon a contingency which might happen during the lifetime of the testator, or not until many years after his decease, or which, indeed, might never happen. If the object of the testator had been, as was suggested, to preserve the property in his family, no good reason is perceived why it was not given to the ultimate survivor. It may be further remarked, in this connection, that although the contingency upon which the estate depended might not happen for an indefinite period after the death of the testator, yet he made no disposition of the estate for the time intervening between his death and the happening of the contingency. If it be said that the devise should be so construed as to give the estate to the last survivor, it may be replied that such a construction would be doing greater violence to the language of the will, than to hold the devise to be unconditional. The devisees are expressly named; their sister Mrs. Inches had previously deceased; and the expression "the survivors of my brother and sisters" was a correct description of the devisees, in the then state of the family. It is at least as probable that these words were used by the testator by way of description, as that they were used for the purpose of creating a survivorship of the character suggested by the plaintiff. Looking at the language of this clause, without reference to other parts of the will, we perceive no impropriety in transposing the members of the sentence, and in reading the clause in this manner: "The residue of my real and personal estate, &c., I give to Martin Brimmer, Eliza O. Brimmer and Mary Ann Brimmer, who are the survivors of my brother and sisters."

Upon the construction contended for by the plaintiff, a tenancy in common would be created between the two survivors, but not necessarily at the time of the testator's death. We are satisfied, however, that the object of the testator was

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to provide against the death of one or more of the devisees during his lifetime, and that he intended to create a tenancy in common between all the devisees who should survive him, with the right of possession immediately after his decease. Upon this construction of the will, which we believe to be the only one that will give effect to the intention of the testator, at his death Mary Ann Brimmer became a tenant in common with the other residuary devisees.

By the will, then, of George W. Brimmer, Mary Ann Brimmer (who also died testate) took an undivided third part of the residue of the real and personal estate of the testator; and the second question is, whether, by her will, her interest in this real estate passed to Martin Brimmer, the defendant's testator.

George W. Brimmer died in 1838. The will of Mary A. Brimmer was made in 1835, and the codicil in 1837, so that her interest in the estate of George W. did not vest until after the making of the codicil. The question is, therefore, whether by her will this after acquired real estate passed to her devisee. By a well known rule of the common law, after purchased real estate did not pass by a will. And this rule was enforced so strictly, that a will was held to be inoperative upon real estate of which the testator was the owner at the time of the making of the will, and afterwards sold, then repurchased, and died seized. The rule required that the testator should be seized at the time of the making of his will, and that he should continue seized, without interruption, until his death. The legislature became satisfied that this rule tended to defeat the intention of testators, and, consequently, it was changed by the revised statutes, which went into operation on the first day of May, 1836. It was insisted, on the part of the plaintiff, that this will, having been made in 1835, did not come within the operation of the revised statutes, although the testatrix survived three years and upwards after the change in the law took place. But whether there be any force in that objection or not, we do not think it applies in the present case. In 1837, the testa-

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trix, by the codicil, ratified, confirmed and republished the will, the effect of which was, to give the same force to the will as if it had been written, executed and published at the date of the codicil. In this manner the will is brought directly within the operation of the revised statutes, and is to be construed according to the provisions of that code.

The Rev. Sts. c. 62, § 3, provide that "any estate, right or interest in lands, acquired by the testator, after the making of his will, shall pass thereby in like manner as if possessed at the time of making the will, if such shall clearly and manifestly appear, by the will, to have been the intention of the testator."

It is not supposed that the intensives "clearly and manifestly," as used in this section, can have any well defined or precise effect in the construction of wills. They are too vague and indeterminate to form a rule of much practical use. The statute requires, undoubtedly, that the intention of the testator should be fairly inferable from the will, but it does not require an express declaration. The intention is a matter of deduction or inference from given premises. Suppose a testator to express his desire (as is sometimes done in the introductory part of a will) to dispose of all such property, as he might leave at his decease, and, after specific bequests, to devise all the residue of his estate; can it be doubted, that after purchased land would pass by such a will, and yet the operative words of the devise might be satisfied by restricting them to lands which the testator owned at the time of making the will? Under this section, the true question seems to be, to what period of time was the attention of the testator directed? Was it fixed exclusively upon the condition of his estate at the time of making the will? or did he contemplate the possibility of future changes, and intend to embrace within the scope and operation of his will his whole estate at the time of his decease? In other words, did he intend to die testate as to all the property which he might leave, or was he content to die intestate as to a part, and leave it to be distributed according to law?

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The provisions in this will, to which the attention of the court has been directed, are as follows: "One moiety of all the residue of my estate, real, personal and mixed, wheresoever the same may be situated, I devise and bequeath unto my sister Eliza O. Brimmer, to hold during her natural life."

"All the residue of my estate I devise and bequeath unto my brothers, George Watson Brimmer and Martin Brimmer, their heirs and assigns forever, in case they both survive me; otherwise my will is, that the brother who shall survive me shall take the whole and entire residue of my estate."

Upon what estate did the testatrix intend that these clauses should operate? Did she intend to limit them to the estate owned by her at the republication of the will? or did she intend to embrace within their operation all the property which she might own at her death?

Every testator is aware that his will cannot take effect until after his death; that until that event all his property remains at his disposal; and, ordinarily, it is from that period that his intention to settle its final destination may be presumed. The rule of the common law, before referred to, is purely artificial; it did not grow out of the subject naturally or spontaneously, but, on the contrary, it is inconsistent with the terms, in their popular acceptation, in which a residuary devise is commonly made. And wherever there is a devise of the whole estate, or of all the residue of the estate, of a testator, there being both real and personal estate upon which the will may operate, an intention to give after acquired real estate may, perhaps, be justly inferred, unless there be some indication of a different intention to be found in the will. *Wait* v. *Belding*, 24 Pick. 136, 137. Such is the effect of a will upon after acquired personal property; and, without the aid of professional advice, few testators are aware, that, in this respect, there is any distinction between personal property and real estate. In the present case, there is a devise to the plaintiff, for life, of one moiety of *all the residue* of the estate of the testatrix, real, *personal* and mixed: then follows a devise to the brothers of *all the residue*, including the other

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moiety of the estate, real, *personal* and mixed, together with the remainder after the termination of the plaintiff's life estate. The arrangements made by the testatrix were, therefore, prospective, looking forward to an event which might not happen until many years after her decease. And in this connection, the concluding paragraph is, we think, very significant. The estate is given to the brothers in case they should both survive the testatrix; "otherwise, my will is, that the brother who shall survive me shall take the whole and entire residue of my estate" — language as comprehensive and as emphatic as could well be used, and, as it appears to us, clearly intended to embrace the residue of all the estate which the testatrix should leave at the time of her death. In contemplating the event of survivorship, the mind of the testatrix was carried forward to a state of things which would exist at the period of her decease; and it is with a reference to that period that the disposition of her whole property is made. It is the opinion of the court, that the testatrix did intend not to die intestate as to any part of the estate which she might leave, and that the after acquired real estate did pass, by her will, to the surviving devisee, Martin Brimmer.

WILLIAM FURNESS, Executor, *vs.* CHARLES FOX.

A legacy to one, "if he shall arrive to the age of twenty-one years, then to be paid over to him by my executor," is not a contingent but a vested legacy.

WILLIAM FURNESS, of Medford, by his will dated March 2d, 1836, of which the plaintiff was the executor, provided as follows:

"In the first place I give and bequeath to my grandson, John William Furness son of my son John C. Furness deceased five hundred dollars, if he shall arrive to the age of twenty-one years, then to be paid over to him by my executor hereinafter named."

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"All the rest residue and remainder of my estate both real and personal of every sort and description and wherever situated or being I give devise and bequeath to my children" (naming five persons) "their heirs and assigns forever to be equally divided between them."

On the 23d of May, 1842, the plaintiff, as the executor of William Furness, paid the legacy of five hundred dollars, to Charles Fox, the defendant, guardian of the legatee, John William Furness, who was then under age. At the same time, the defendant gave the plaintiff his receipt for the money in the following words:

"Received of William Furness, executor of the last will and testament of William Furness, of Medford, deceased, five hundred dollars, said sum having been bequeathed by said William Furness deceased to his grandson John William Furness, to be paid to him, should he arrive at the age of twenty-one years. Charles Fox, guardian of said John William Furness."

Subsequent to this payment, the legatee, John William Furness, died, before arriving at the age of twenty-one years; and the plaintiff thereupon brought this action, in his capacity of executor, against the defendant, as the guardian of the legatee, to recover back the money so paid.

The cause was tried in the court of common pleas, before *Washburn*, J., who ruled, that the legacy to John William Furness was contingent upon his arrival at the age of twenty-one years, and consequently lapsed by reason of his death, before arriving at that age.

The jury returned a verdict for the plaintiff, and the defendant filed exceptions.

J. Field, for the defendant, cited Swinburne on Wills, Part IV., § 17, (6); *Lord Pawlet's case*, 2 Vent. 366. *Chandos* v. *Talbot*, 2 P. W. 601, 610; *Anonymous*, 2 Vent. 346; *Hervey* v. *Aston*, Willes, 83, 90; *Stapleton* v. *Cheele*, 2 Vern. 673.

S. E. Sewall, for the plaintiff, referred to *Lawrence* v. *Carter*, 16 Pick. 12, to show that the action could be main

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tained; and, for the construction of the bequest, to *Lister* v. *Bradley*, 1 Hare, 10; *Stapleton* v. *Cheales*, Pre. Ch. 317.

METCALF, J. The sole question raised by these exceptions is, whether the legacy to the defendant's ward was vested or contingent. The testator's words were these: "I give and bequeath to my grandson, John W. Furness son of my son John C. Furness deceased five hundred dollars, if he shall arrive to the age of twenty-one years, then to be paid over to him by my executor." The rule on this subject is plainly stated in many judicial opinions and elementary books, and the only difficulty is in a right application of it to particular cases. In 3 Wooddeson, 512, the rule is well expressed, as follows: "If the time of payment merely be postponed, and it appear to be the intention of the testator that his bounty should immediately attach, the legacy is of the vested kind; but if the time be annexed to the substance of the gift, as a condition precedent, it is contingent, and not transmissible." See also Godolphin, Part III. *c.* 17, § 11; 1 Roper on Leg. *c.* 10, § 2. We have, therefore, only to inquire whether, in the case before us, the words, "if he shall arrive to the age of twenty-one years," relate to the words which precede, or to the words which follow them; or, in other language, whether the arrival of the legatee at the age of twenty-one years is a condition precedent to the gift of the money, or only to the payment of it into his hands. And we are of opinion that the testator meant to make an immediate bequest to the grandson, as the representative of his deceased father, but that the money should not go into his hands, during his minority. This seems to us to be the most natural construction of the mere words of the bequest, although the testator's meaning is obscured by the unfortunate collocation of those words, and the inartificial punctuation of the sentence. We are somewhat confirmed in this construction by the only other devising clause in the testator's will. After the bequest to his grandson, he gave all the residue and remainder of his property to his five children who were then alive, to be equally divided among them, without any limitation over, by

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express mention, of the five hundred dollars, in the event of his grandson's dying under age. It is true that this residuary clause would have passed to the five children the money bequeathed to the grandson, if the legacy to him had failed of effect; but it is hardly probable that the testator knew that such would be its legal operation.

The exceptions do not show who is entitled to the money in question, since the decease of the legatee; but they do show that the plaintiff, as executor, has no claim to it.

New trial ordered.

HERMAN J. KING *vs.* OWEN HOWARD.

Where an agreement was made for the loan of fifty dollars, for one week, for the sum of two dollars to be paid as interest therefor; and, at the expiration of the week, the lender agreed to allow the loan to remain, on condition that the borrower would pay therefor at the rate of two dollars a week, for so long a time as the loan should remain unpaid; and, in pursuance of this agreement, the borrower paid two dollars a week for twenty-four weeks, and brought an action on the Rev. Sts. *c.* 35, § 3, to recover threefold the amount of interest so paid; it was held, that he was a competent witness, under § 4, both to the original agreement and to the subsequent payments.

Where the plaintiff recovered a verdict for a trifling amount more than the facts alleged in his declaration would entitle him to, the court refused to set aside the verdict, and order a new trial, for the correction of the error, provided the plaintiff would release the excess from the amount of his judgment.

Duplicity in pleading can only be taken advantage of by special demurrer; and, special demurrers being abolished, this objection cannot now be maintained.

THIS was an action of debt, on the Rev. Sts. *c.* 35, § 3, to recover threefold the amount of interest, alleged to be usurious, paid by the defendant to the plaintiff.

The declaration contained two counts. The first count stated, that, on the ninth of June, 1845, the plaintiff applied to the defendant for a loan of fifty dollars, for a week; that the defendant offered to make the loan accordingly, for the sum of two dollars, to be paid him by the plaintiff, by way of interest therefor; that the plaintiff assented to this proposal, and made and delivered to the defendant his promissory note for fifty dollars, payable in one week; that the defend-

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ant thereupon delivered the plaintiff the sum of forty-eight dollars, reserving the sum of two dollars, as the interest; that, on the sixteenth of June, when the note became due, the defendant agreed with the plaintiff, to allow the note to remain, on condition that the plaintiff would pay him the sum of two dollars a week, by way of interest, for each and every week the loan should remain unpaid; and that the plaintiff paid the defendant, in pursuance of this agreement, two dollars a week for interest on the loan for twenty-four weeks, the first payment being made on the day the note became due; amounting in all to the sum of fifty dollars, for interest on the sum of fifty dollars, for the term of twenty-five weeks, being interest thereon at a greater rate than that allowed by law; by reason whereof, the plaintiff became entitled to recover of the defendant threefold the amount of the interest so paid, amounting to the sum of one hundred and fifty dollars. The second count contained a general statement of the same cause of action. The defendant pleaded the general issue, and the cause was tried thereon, before *Colby*, J., in the court of common pleas.

The plaintiff offered himself as a witness, under the fourth section of the statute, for the purpose of proving the contract, and the payment of the usurious interest. The defendant objected; 1. That the plaintiff ought not to be admitted as a witness, because it was not alleged in the declaration, that the sum of two dollars, which was agreed to be reserved or paid, at the inception of the contract, had been paid; and, 2. That the plaintiff, if admitted as a witness to prove the original contract, could not be allowed to testify to the subsequent payments of two dollars a week, agreed upon after the original contract was made.

The defendant also objected to the declaration, that it set forth more than one contract between the parties; and that it did not set forth that the note for fifty dollars had ever been paid.

The court overruled all the objections, and the jury returned a verdict for the plaintiff. The defendant, thereupon, filed exceptions.

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W. Brigham, for the defendant. 1. The declaration does not aver, that the sum of two dollars has been paid by way of interest for the first week. When the note became due, at the end of the week, the plaintiff paid two dollars; but this was in pursuance of the new agreement which was then made, by which the payment of the note (including the two dollars) was conditionally postponed, so long as the plaintiff should pay for the forbearance, at the rate of two dollars a week; and, as it is not averred, that the note has ever been paid, it consequently does not appear, that the first week's interest has ever been paid.

2. It does not appear, from the terms of the original contract, that the twenty-four payments made subsequent thereto were then in the contemplation of the parties. Those payments therefore must either be considered as voluntary, and so not usurious; or as having been made in pursuance of subsequent promises, and thus directly within the authority of the case of *Brickett* v. *Minot*, 7 Met. 291. In either case, the plaintiff was not a competent witness, under the statute; those twenty-four payments not being of interest *reserved* by the original contract or *taken* in pursuance of it.

3. The declaration is insufficient, in not setting forth the transactions between the parties, with the requisite precision. It should state whether the note had been paid, and how much the plaintiff demanded to recover on each contract. In *Livermore* v. *Boswell*, 4 Mass. 437, Parsons, C. J., says that, "in usury, the illegal contract must be precisely set forth and proved."

The declaration is also bad, for setting out twenty-five distinct contracts, and attempting to consolidate them into one. *James* v. *Shore*, 1 Stark. R. 426. Where there are two or more distinct special contracts, it will be a fatal misdescription, if the plaintiff, in his declaration, blend them together, and treat them as one. 1 Chitty on Pleading, 337.

F. W. Sawyer, for the plaintiff. The plaintiff was clearly admissible as a witness, under the statute; the question

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whether illegal interest had been reserved and taken being put in issue by the pleadings.

The declaration does not set out twenty-five contracts, but one only; the whole amount of interest was paid on one note; interest was agreed for at the rate of two dollars a week; and all the payments were made in pursuance of that agreement. In *Smith* v. *Northrup*, 1 Root, 387, in which the defendant wrote, at the bottom of a note signed by himself, a promise to pay the interest on the note, the court said the engagement to pay the interest was no more than the law implied without it. The cases of *Commonwealth* v. *Tuck*, 20 Pick. 359, which was an indictment for breaking and entering with intent to steal, and stealing, and *Commonwealth* v. *Eaton*, 15 Pick. 274, in which the indictment was for offering to sell and selling a lottery ticket, are somewhat analogous. The objection taken to the declaration is, that it sets out more than one contract, in other words, that it is bad for duplicity. But this can only be taken advantage of by special demurrer; (*Smith* v. *Northrup*, above cited; *Saunders* v. *Crawley*, 1 Rol. R. 112; *Otis* v. *Blake*, 6 Mass. 336;) and, in this case, the suggestion was not made, until after the general issue had been pleaded and joined.

Wilde, J. This is an action of debt to recover threefold the amount of the interest paid by the plaintiff to the defendant in pursuance of a usurious contract. The plaintiff at the trial was admitted to testify, the defendant objecting, and the court are of opinion, that he was rightly admitted, in conformity with the fourth section of the Rev. Sts. c. 35. The question, whether unlawful interest had been taken, was put in issue by the pleadings. The declaration alleges, that the whole sum of fifty dollars was paid by the plaintiff to the defendant, as interest on the sum lent. It is true, that it is also alleged in the declaration, that when the loan was first made, the plaintiff gave his note to the defendant for the sum of fifty dollars, and that the defendant thereupon delivered to the plaintiff the sum of forty-eight dollars, reserving the sum of two dollars as interest on said sum. How the

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fact was does not appear, for the evidence is not reported. But, however this may be, the sum is trifling, and if the plaintiff will release six dollars from the amount of his judgment, there can be no reason for granting a new trial to correct this error.

The defendant's counsel rely on the case of *Brickett* v. *Minot*, 7 Met. 291. But there is a material distinction between that case and this. In that case, no usurious contract was set out in the declaration. The contract set out was for the payment of lawful interest only, and the averment was, that the plaintiff had afterwards paid to the defendant unlawful interest, from time to time; but it was not averred, that these payments were made in pursuance of any contract or agreement. And that case was decided on the ground, that no such usurious contract or agreement was set out in the declaration, and that the payments were to be considered as voluntary. In the present case, all the payments of interest are alleged to have been in pursuance of a previous agreement.

Another exception was taken to the ruling of the court at the trial. The defendant objected to the declaration for duplicity, and this objection was overruled, and we think rightly; for duplicity can be taken advantage of by special demurrer only, according to a well known rule of pleading; and now, special demurrers being abolished, this objection cannot be maintained in any case.

But if the declaration were insufficient, the defendant cannot except to the ruling of the court, as he may have the same advantage of his objection on a motion in arrest of judgment. If a declaration is clearly bad, the court may express an opinion of its defect, that the plaintiff may have an opportunity to move for leave to amend; but this is within the discretion of the court, and is not liable to exception.

Exceptions overruled.

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The President, Directors, &c., of the Tremont Bank *vs.* The City of Boston.

The real estate of a bank, including its banking-house, is liable to taxation in the town where such estate lies.

This was an action of assumpsit for money had and received, brought to recover the sum of four hundred and seventy-three dollars and ten cents, paid by the plaintiffs to the defendants, under protest, on a warrant of distress for taxes; and came before this court, by appeal from a judgment of the court of common pleas, rendered in favor of the plaintiffs, on an agreed statement of facts.

The property of the plaintiffs, on which the taxes in question were assessed, consisted of real estate in the city of Boston, and of certain stocks pledged to and held by the plaintiffs as collateral security.

From the statement of facts, it appeared, that the only real estate of the plaintiffs was their banking-house, which had always stood on their books as a part of their capital, and a dwelling-house in the rear of the banking-house. The latter was originally built and intended for, and for some years occupied by, the messenger of the bank and his family; but, for some years, including the year 1845, for which these taxes were assessed, it had been leased by the plaintiffs at an annual rent. It being conceded, that the question as to the stocks had been settled in favor of the plaintiffs, by the case of the *Waltham Bank* v. *Waltham*, 10 Met. 334, decided since the commencement of the present action, the argument was confined to the validity of the tax assessed upon the real estate.

B. R. Curtis, for the plaintiffs. If the seventh section of the Rev. Sts. *c.* 7, is applicable to and includes the real estate of banks, the plaintiffs were rightly assessed. But this construction, if adopted, would make the real estate of banks liable to double taxation.

The real estate of banks is a part of their capital stock.

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which, to an amount not exceeding twelve per cent, they are allowed to hold in that form by the Rev. Sts. *c.* 36, § 15, for the convenient transaction of their business, and for which they are liable to pay a tax to the state, by Rev. Sts. *c.* 9, § 1. The real estate of the plaintiffs has always been returned as a part of their capital, and a tax has been paid for it as such to the commonwealth. The capital of a bank, also, including its real estate, is taxable as personal estate to the individual stockholders. Rev. Sts. *c.* 7, §§ 4 and 9. The provision of the Rev. Sts. *c.* 7, § 10, *par.* 2, that, in assessing the stockholders of manufacturing corporations for their shares, the value of the real estate belonging to the corporation shall first be deducted, clearly indicates the opinion of the legislature, that, where no such provision is made, the real estate of corporations, banking as well as others, is included in and makes a part of their capital stock, and, as such, taxable personally to their stockholders. If, in addition to this, the real estate of a bank may also be taxed to the bank itself, under § 7, then, whatever view may be taken of the tax to the commonwealth, such real estate will be liable to be at least twice taxed; and double taxation is not to be presumed as the intention of the legislature, unless expressed in clear and unequivocal language. *Boston & Sandwich Glass Co.* v. *Boston*, 4 Met. 181.

P. W. Chandler, (city solicitor), for the defendants. The provision of the Rev. Sts. *c.* 7, § 7, that real estate shall be taxed in the town where it lies, to the person who shall be the owner thereof, on the first day of May, has been repeatedly recognized by this court as applicable to and including the real estate of corporations. *Salem Iron Factory* v. *Danvers*, 10 Mass. 514; *Amesbury Nail Factory* v. *Weed*, 17 Mass. 53; *Amesbury M. C.* v. *Amesbury*, 17 Mass. 461; *Goodell Man. Co.* v. *Trask*, 11 Pick. 514. No reason can be suggested for a distinction, in this respect, between banks and other corporations, or why the former should be made an exception to the general rule.

The argument from double taxation is not applicable to

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the extent supposed. It is not, indeed, to be presumed; but where the meaning of the legislature is clear, it is not to be disregarded because it imports a double tax. The real estate of manufacturing corporations was always doubly taxed, until the law was changed as to them by the Rev. Sts. c. 7, § 10; and such is now the law as to the real estate of railroad corporations. *Worcester* v. *Western Railroad*, 4 Met. 564.

The true inference from the special provision of the Rev. Sts. c. 7, § 10, by which the real estate of manufacturing corporations is exempted from double taxation, is, that, as no such exemption has as yet been provided in favor of banks, the real estate of the latter comes under the general principle of § 7, and is liable to be taxed both to the stockholders, in the form of stock, and to the banks themselves, as the owners.

Dewey, J. The question, as to the liability of banking corporations, to be taxed for the stocks of incorporated companies, pledged to and held by the former as collateral security, was fully considered and settled by this court in the case of *Waltham Bank* v. *Waltham*, 10 Met. 334. To the extent, therefore, of the taxes assessed upon the plaintiffs, for stocks thus held, they will be entitled to recover in the present action.

The further inquiry is, whether a banking corporation is liable to taxation for real estate, held and used by it principally for the purpose of a banking-house. The Rev. Sts. c. 7, § 7, declare, in terms, that all the real estate, within the limits of each town, is a proper subject of taxation by the assessors thereof; and no exception is made, by any direct provision of law, in favor of the real estate of banks. The inquiry, therefore, is the general one, whether the law, relating to the taxation of real estate, was intended by the legislature to apply to the real estate of banks? It has always been supposed, that the law as to the taxation of personal estate did not apply to the money capital of the banks, existing in the form of personal securities for money loaned, or in gold and

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silver in their vaults. The provisions of the Rev. Sts. c 9, § 1, imposing a tax of one half of one per cent, semi-annually, upon the amount of the capital stock of every bank, payable to the treasurer of the commonwealth, with the further liability of the individual stockholders, severally, to be taxed in the towns where they dwell, for their shares of the capital stock of the bank, must be considered as the extent of the liability of banking corporations to taxation for personal estate. But, in practice, a different rule has been very extensively, if not universally, adopted, as to the taxation of the real estate owned by a bank, although constituting in fact a part of its capital stock.

It may be truly urged, that such a tax upon a bank effects a double taxation upon the capital stock, to the extent that it is invested in real estate; such capital being liable, at the same time, to an assessment as personal property, in the form of a tax upon the shareholders. Entire equality of taxation would seem to require, that the real estate of banks should be put upon the same footing, in this respect, with the real estate of manufacturing corporations, the value of which, in assessing the stockholders for their shares, is first to be deducted therefrom. Rev. Sts. *c.* 7, § 10, *par.* 2.

There being no similar provision however with regard to the property of banking corporations, the liability of those institutions to taxation for the real estate held by them, and the liability of their stockholders to be taxed for the shares of personal estate which they hold, must be governed by the general law regulating the assessment of taxes. The Rev. Sts. *c.* 7, § 7, provide, that "all taxes on real estate shall be assessed, in the town where the estate lies, to the person, who shall be either the owner or in possession thereof, on the first day of May." Banking corporations, as well as individuals, may be the owners or in possession of real estate; and if the real estate owned or held by a bank is to be taxed as such, it is quite obvious, that the proper mode is, for the assessors of the town in which it lies to assess the tax thereon

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to the corporation itself. The law, we think, fully authorizes such taxation, and justifies the practice, which has hitherto so generally prevailed, of assessing a tax upon banking corporations, for the real estate owned or held by them, including that used for a banking-house, in the town where such estate lies.

The plaintiffs are entitled to judgment only for the amount of the taxes assessed on the personal estate.

Samuel Fowle *vs.* Bowen Harrington.

B. H., after the dissolution of a partnership between himself and S. W., made a negotiable promissory note, in the name of the late firm of W. and H., payable to S. W. and S. F. as partners under the firm of W. and F.; and, after a dissolution of the last named firm, and the death of S. W., S. F., in the name of W. and F., indorsed the note to himself: — it was held, that S. F. could not maintain an action on the note, as indorsee; but that as surviving promisee he was entitled to recover, on the money counts, against B. H., either as surviving promisor, if the note had been subsequently ratified by S. W., or as sole promisor, if it had not been so ratified.

The facts in this case are sufficiently stated in the opinion of the court, which was delivered by

Metcalf, J. This is an action of assumpsit against the surviving partner of the late firm of Wheeler and Harrington. The declaration contains the money counts, and also a count on a promissory note, alleged to have been made by the said firm to the firm of Wheeler and Fowle, and by them indorsed to the plaintiff. A trial was had in the court of common pleas, and the case now comes before us on exceptions to the ruling of that court.

It appears, from the bill of exceptions, that the plaintiff gave in evidence a note of the following tenor: "June 13th, 1839. On demand with interest, for value received, we promise to pay Wheeler and Fowle, or order, one hundred and forty dollars and twenty-five cents. For the late firm of Wheeler and Harrington. Bowen Harrington."

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It also appears that evidence was introduced, tending to show that Samuel Wheeler and the defendant had been partners, under the firm of Wheeler and Harrington, and that their partnership was dissolved before the 1st of June, 1839; that the said Wheeler and the plaintiff entered into partnership, before the date of the note in suit, under the firm of Wheeler and Fowle, and that "this note" (to use the words of the exceptions) "was given by Wheeler and Harrington to Wheeler and Fowle;" that the partnership of Wheeler and Fowle was dissolved in 1841; that Wheeler died on the 1st of June, 1845; and that the plaintiff, on the same day, after the death of Wheeler, indorsed the said note in this manner: "Wheeler and Fowle. Pay to the order of Samuel Fowle."

The defendant contended that, upon this evidence, the action could not be maintained. But the court ruled otherwise, and a verdict was returned for the plaintiff.

We are of opinion that the evidence does not support the count in which the plaintiff claims as indorsee of the note. One partner cannot, after a dissolution of the partnership, make or indorse a note, in the name of the firm, so as to bind the other partner. But the note, in this case, was not only so made by one partner, but was also so indorsed. The plaintiff, therefore, cannot support his claim as indorsee.

We are of opinion, however, that the money counts are supported by the note. The plaintiff, being in possession of it, and the indorsement being a nullity, he holds as surviving promisee, and is the only person who can collect it by suit; the representatives of Wheeler having no legal interest in it. And how stands the defendant? He gave the note in the name of Wheeler and Harrington, after the dissolution of their partnership; and if Wheeler, by afterwards joining with him in giving the note to Wheeler and Fowle, ratified it as a partnership note, then the defendant is rightly sued, as surviving promisor, by the surviving promisee. If Wheeler did not ratify the note, yet the defendant is himself bound by it, according to the doctrine held in *Elliot* v. *Davis*, 2 Bos. & Pul. 338, and is rightly sued, as sole promisor, by the sur-

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viving promisee. In either view of the case, the note supports the money counts.

Exceptions overruled.

A. H. Nelson, for the defendant.
W. Brigham, for the plaintiff.

BENJAMIN B. MUSSEY *vs.* THE BULFINCH STREET SOCIETY.

The Central Universalist Society, in Boston, was incorporated January 21st, 1823, with all the powers, privileges, and immunities, belonging to other religious societies, by law, and with power to purchase, hold, and dispose of any estate, real or personal, the annual income of which should not exceed a certain sum, for the purposes of its incorporation: The corporation, having erected a meeting-house, caused the pews therein to be appraised and assessed by a committee duly appointed and authorized for the purpose, and to be offered for sale at public auction, at the appraisal: The pews were all sold, accordingly, May 12th, 1823, and deeds thereof, prepared by the committee, in pursuance of its authority, were given by the corporation to the purchasers: The terms of the deeds were, that the pews should remain the property of the purchaser, so long as he should pay such sums, as should from time to time be assessed thereon by a legal vote of the society, for the support of the minister, repairs of the house, and other necessary expenses; but that if he should neglect to pay the assessments for one year, the pew should revert to the corporation, which was authorized and empowered to sell the same, and, after deducting what might be due to it with incidental charges, to pay the residue to such purchaser: The corporation, May 20th, 1823, adopted certain by-laws, by which, the mode of assessing and collecting the taxes, and the proceedings on the forfeiture and sale of pews, were regulated and prescribed, and which provided for the appointment of a standing committee, whose duty it was made, among other things, "to compute the expenses of the society and assess them on the pews according to their appraisal:" No appraisal and assessment were ever made subsequently to the first, but the taxes were notified by the treasurer, and paid quarterly by the members, upon the basis of the original appraisal and assessment, with occasional temporary additions to the amount, and a permanent one of ten per cent in 1833, but with no change in the proportions: There was no record of any computation of the expenses, or assessment of the taxes, until July, 1841, when the expenses were computed by the standing committee, and the amount directed to be ratably levied and assessed, on the pews, according to the assessment and appraisal of 1823: But it appeared by the records, that, since the year 1835, accounts of the taxes received quarterly, and of the expenditures incurred, had been annually rendered by the treasurer to the standing committee and proprietors, and had been approved by both, and that the doings of the standing committee, for the same time, had been uniformly approved by the society: On the 17th of April, 1838, an act was passed by the legislature, at the request of the society, changing its name to the Bulfinch Street Society, which was accepted by the corporation; and, in October of the same year, a minister of the Unitarian denomination was settled over it: The plaintiff

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purchased a pew of one of the original proprietors, on the 29th of January, 1839, and two others March 13th, 1840, and, in pursuance of a transfer indorsed on the original deeds, received new deeds thereof from the corporation, in the name of the Bulfinch Street Society: The plaintiff having refused to pay the taxes assessed on his pews subsequently to February, 1840, measures were taken by the society for the sale of his pews, as forfeited, according to the terms of the deeds; and the plaintiff, thereupon, to prevent such sale, paid the sum demanded, under protest. In an action brought to recover the sum thus paid, it was held:

1. That, as no mode of taxation was prescribed by the act of incorporation, the society had a right to adopt any mode, which was not prohibited by law; and, consequently, with the assent of all the proprietors, might tax the pews in its meeting-house, and regulate the proceedings therefor, by its by-laws.
2. That the proprietors of pews (who alone were members of the society) had a right to consent to the taxation of their pews, by receiving deeds expressly au thorising the levy and assessment of taxes thereon.
3. That, under the power to purchase, hold, and dispose of property, the corporation might let or sell the pews in its meeting-house, on the condition, that the lessee or grantee should pay a certain sum yearly, or such taxes as should be lawfully assessed thereon.
4. That one who purchased a pew, and thereby became a member of the corporation, subsequent to the change of name, and received a deed from the society under its new name, was thereby estopped from calling in question the validity of the pro ceedings with reference to the change of name.
5. That the taxes might be laid on the pews, according to the original appraisal and assessment of 1823, with such alterations therein, permanent or temporary, as might from time to time be made by the corporation.
6. That the approval of the treasurer's accounts, and of the doings of the standing committee, with reference to the taxes and expenditures, was equivalent to a computation of the expenses, as required by the by-laws.
7. That the provisions of the Rev. Sts. *c.* 20, §§ 7 and 30, do not extend to and regulate the proceedings of those religious societies, which have the right to tax pews, whether expressly conferred by law, or acquired by the consent of the proprietors; and, consequently, that such societies may regulate, by their by-laws, the mode of assessment and taxation.
8. That, on the forfeiture of a pew, for the non-payment of the taxes due thereon, for a year, according to the condition in the deeds, the corporation had a right to deduct and retain from the proceeds all the taxes then due, as well those which had been due less as those which had been due more than a year.

This was an action of assumpsit, to recover the sum of one hundred and twenty-eight dollars, paid by the plaintiff to the defendants, under protest, and in order to prevent certain pews, belonging to him, in the defendants' meeting-house, from being sold for the payment of taxes. The writ was dated September 3d, 1842, and contained the common money counts. The cause was tried in the court of common pleas, at the January term, 1843, before *Williams*, C. J., who, being of opinion on the whole evidence, that the action could not be maintained, directed a nonsuit. The plaintiff thereupon

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filed exceptions to this order, and to certain rulings of the court, in the course of the trial, excluding evidence offered by him, and admitting evidence against his objections.

From the report of the evidence, as contained in the bill of exceptions, the following facts appeared.

The legislature, by an act approved January 21st, 1823, incorporated (§ 1) certain persons named therein, fifty-five in number, together with all others who might associate with them, and their successors, as a religious society, by the name of the Central Universalist Society, in the city of Boston, with all the privileges, powers, and immunities, to which other religious societies in this commonwealth were entitled by law; and with express authority (§ 2) to purchase, hold, and dispose of any estate, real or personal, for the use of the society, provided the income thereof should not exceed, at any time, the value of four thousand dollars.

On the 28th of April, 1823, — the society having been previously organized under the act of incorporation, — a meeting of the corporation was held, at which a committee was appointed to appraise the pews in the new meeting-house belonging to the society in Bulfinch Street, and to assess the same; to cause the pews to be offered for sale, at a proper time, and to sell them, but not for a price less than the sums at which they were severally appraised; and to prepare suitable deeds of the pews to be given to purchasers. The committee proceeded accordingly, and appraised the pews, and fixed the proportions, to be paid by the several proprietors, of all taxes to be levied thereon, for defraying the expenses of the society. In this appraisal, the amount of tax to be assessed upon each pew was not fixed at any regular proportion of the value of each as compared with others; pews valued at four hundred and twenty dollars being taxed twenty-four dollars, and pews valued at one hundred dollars, one hundred and twenty-five dollars, one hundred and forty dollars, one hundred and fifty dollars, one hundred and sixty-five dollars, being all taxed at ten dollars each. The pews were subsequently advertised for sale; and, on the 12th of May, 1823,

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were put up and sold at auction, under the direction of the committee, and deeds thereof prepared by the committee were given to the purchasers.

The deeds were signed by the treasurer, by order and in behalf of the society, attested by the signature of the clerk, and were in the following form:

Know all men by these presents: That for and in consideration of four hundred and twenty dollars, paid by S. C., of Boston, in the county of Suffolk, to the Central Universalist Society in Boston, for pew No. 66, in the Central Universalist Meeting-house, in Boston aforesaid, said C. is hereby declared and acknowledged to be the sole, true, lawful, and legal owner of said pew No. 66, which pew is to remain the property of the said C. his heirs and assigns, so long as he or they shall pay or cause to be paid such sum or sums of money as shall from time to time be assessed thereon, by a legal vote of said society, for the support of the minister, repairs of the house, and other necessary expenses.

And, if said C., his heirs or assigns, should fail of paying, or causing to be paid, the said assessments, for one year, then said pew shall revert back to the society, who are hereby authorized and empowered to sell said pew No. 66, and after deducting what may be due to said society and incidental charges, shall pay the overplus to said C., or his legal heirs and assigns.

And if said C. should at any time intend to transfer said pew, No. 66, he shall first offer it to the society; and whenever said pew is transferred, the taxes due thereon shall be paid to the end of the quarter in which the transfer is made.

The appraisal and assessment were not recorded in the society's records at the time they were made; but the defendants produced a certificate, recorded therein June 20th, 1841, signed by nine persons describing themselves as the surviving members of the committee, which contained a copy of such appraisal and assessment; and it was agreed, for the purposes of the trial, that the persons, whose names were subscribed to the certificate, would testify to the facts above stated, relative to the making of the appraisal and assessment; that a report was made by the committee in accordance therewith; and that the appraisal and assessment so made had ever since been observed and acted upon by the society.

On the 18th of May, 1823, certain by-laws were adopted by the corporation.

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By the third article of these by-laws, the standing committee of the society was required, among other things, "to examine and approve all accounts against the society, before authorizing the treasurer to pay them; and to compute the expenses of the society, and assess them on the pews according to their appraisal." The treasurer, by the fourth article, was required "to give special notice to delinquent proprietors three months previous to their pews being forfeited; to note to the committee all pews which should become forfeited; to cause notice to be given of their sale, by posting a printed or written notification thereof upon the doors of the meeting-house, and placing one in each pew in the house, at least fourteen days previous to the sale thereof; and to employ a licensed auctioneer to make the sale." By the ninth article, the taxes were required to be paid quarterly; and, if not paid at the expiration of the fourth quarter, it was declared, that the pew, or pews, should become forfeited to the society for their payment, and should then be sold at public auction, and the surplus of the sale, after deducting the moneys due to the society, should be paid over by the treasurer to the former owner thereof.

In the year 1838, the subject of a change of the corporate name of the society was brought forward at a quarterly meeting, regularly notified and held on Sunday afternoon the 18th of February, at which a motion was made in writing, for the appointment of a committee of three, to consider the propriety of applying to the legislature for an alteration of the act of incorporation, "so as to conform to the sentiments of the society and the name of the church." After discussion, the subject was referred to the standing committee, who, at their next regular meeting, came to a vote thereupon, "that it be recommended to the proprietors, that it is expedient to change the name, but would leave it with them to designate."

A meeting of the society being called and held for the purpose, the committee made a report of the vote above mentioned; and a discussion thereupon ensued, at the close of which the report was accepted, by a vote entered on the

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records as nineteen to eleven. It was then voted, that an application be made to the legislature, to change the name of the society to that of the Bulfinch Street Society, and that the clerk prepare and present a petition for that purpose.

The clerk, in pursuance of these votes, prepared a petition, and caused it to be presented to the legislature, in the name and on the behalf of the society, setting forth that the members were desirous that their corporate name should be changed as above mentioned, for the reason, that the term "Universalist," as then theologically defined, expressed a meaning inconsistent with their principles of faith. On this petition being presented, seventeen members of the society signed a memorial or remonstrance, which was presented to the legislature, praying that the name might not be changed, as they knew of no benefit that could arise to the society therefrom; and expressing their belief, that if the change should take place, a division would be created in the society, which they desired to prevent. The legislature, notwithstanding, passed an act, April 17th, 1838, authorizing the society to take the name of the Bulfinch Street Society, whenever, at a legal meeting called for the purpose, it should so elect.

At a meeting of the society held on the 22d of April, 1838, the clerk reported, that, agreeably to the instructions received by him at the meeting of March 18th, he had made application to the legislature, in behalf of the society, for a change of its corporate name, and that the legislature had granted the request and had passed an act accordingly, as already mentioned. The report was accepted.

A meeting of the society being called and held for the purpose of acting upon the result of the application for the change of name, the clerk was directed to read such parts of the records as had reference to the subject of the meeting, together with a copy of the petition for the change of name, and the act passed by the legislature for that purpose; which having been done, it was then voted, that the question of the acceptance of the act be taken by yeas and nays on written

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ballots; and the question was thereupon so taken, and decided in the affirmative, eighteen yeas and fourteen nays.

On the 20th of May, 1838, the by-laws of 1823 were revised and amended, among other particulars, as in the following new draft of the fourth article:

Article 4th. The treasurer shall also be the collector of the society, and shall keep a just account of all the receipts and expenditures thereof, and of all the debts and credits of each member of it, to be open for the inspection of any member of the society, and make a report thereon at the annual meeting.

He shall collect and receive all moneys due to the society, and give special notice to delinquent proprietors, three months before their pews become forfeited.

He shall note to the committee all pews that have become forfeited, and shall cause notice of their sale to be given according to law: namely, he shall post up a notification of the intended sale thereof, at the principal outer door of such church or house, at least three weeks before the time of the sale, therein setting forth the number of the pew, if any, the name of the owner or occupant, if known, and the amount of the tax due thereon; and if said tax or any part thereof shall remain unpaid at the time appointed for such sale, the treasurer shall sell the pew, by public auction, to the highest bidder, and shall execute and deliver to the purchaser a sufficient deed of conveyance of the same; and the money arising from said sale, beyond the taxes and reasonable incidental charges, shall be paid by the treasurer, to the former owner of the pew so sold, or to his (or her) assigns.

On the 25th of January, 1839, the plaintiff became a member of the society, then known as the Bulfinch Street Society, by purchasing a pew of one of the original purchasers at the sale in 1823, who had ever since been the owner thereof. The transfer to the plaintiff was made by an indorsement, signed by the grantor, on the back of the original deed, in the following words: "In consideration of two hundred dollars, I hereby transfer and convey the within named pew to Benj. B. Mussey, January 25th, 1839. S. C." On the same day, the plaintiff received, without objection, a deed of the pew from the society, in the form already mentioned (p. 151) except that the name of the Bulfinch Street Society was substituted therein for that of the Central Universalist Society.

In October, 1839, the Rev. Mr. Gray, a minister of the Unitarian denomination, was settled over the society.

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On the 12th of February, 1840, the plaintiff first refused to pay the tax on his pew, having previously paid the tax thereon from the time of his purchase.

On the 13th of March, 1840, the plaintiff purchased two more pews, and received deeds thereof from the society, without objection, in the form already described.

A special meeting was held on the 25th of October, 1841, in pursuance of an order of the standing committee, and after notice duly given by the clerk, at which certain alterations were made in the by-laws, and a preamble and vote were adopted, confirming the past acts and doings of the corporation, as recorded in the book of records, especially the proceedings relative to the change of name, and to the alterations of the by-laws.

The following are the material changes which were made in the by-laws, at this meeting:

The words "their appraisal," in the third article, relative to the assessment of taxes, were struck out, and, instead thereof the words "the original assessments made by the committee of the proprietors appointed at a meeting held April 28th, 1823, and which is recorded at page 441 of these records," were inserted. The notice to delinquent proprietors, as provided in the fourth article, was abrogated; and, instead thereof, notice was required to be given to such proprietors, as provided in the ninth article, which was revised and amended, as follows:

Article 9th. The taxes shall be paid quarterly, and notice thereof shall be given by the treasurer, by a printed bill or notification left in each pew on the Sunday preceding or next after the day when the tax shall be payable; and if the same shall not be paid within six months after such day, any pew upon which such tax shall remain so unpaid, shall thereby become forfeited, and notice thereof, signed by the treasurer, stating the amount of the taxes due, and of the intention of the treasurer to sell the same, unless they shall be paid with interest, and of the day and hour and place of sale, shall be served on the proprietor, by leaving a copy at his usual place of abode, or by depositing the same in the post office, directed to him at Boston, and in such pew, at least four weeks before the day fixed for such sale; and if the taxes and interest shall continue unpaid, the treasurer shall proceed to make sale of such pew, as prescribed in the fourth article, unless otherwise directed by the standing committee.

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Additional by-laws were also made, relating particularly to the form of the deeds to be given by the society on a transfer of pews. The new form contained a condition, that the grantee should pay all taxes, &c., lawfully assessed upon his pew, pursuant to the by-laws, and, that upon failure or neglect of payment, for the period of six months, the pew should become forfeited and revert to the society, and be sold in the manner prescribed by the by-laws, for the payment of the taxes due thereon.

On the 26th of April, 1842, payment of taxes having been for some time refused by the plaintiff and several other proprietors, the standing committee directed the treasurer to notify the delinquents, that their pews were forfeited, and would be sold at auction, on the 7th of June then next, unless the taxes due thereon, with incidental expenses, should be previously paid. On the 27th of April, the treasurer gave the notices as directed, by sending one in a letter to each delinquent, through the post-office, by depositing them in the pews according to the by-laws of 1841, and by posting a notice three months on the outer door of the meeting-house. The notice consisted of a schedule of the pews, according to their numbers, with the names of the proprietors, and the amount of taxes due on each, and a statement of the time and place of sale.

On the 7th of June, 1842, a sale of the pews of delinquent proprietors took place, agreeably to notice, on the following conditions: "first, cash as soon as knocked down; second, receipt to be given for the money, and deed as soon as it can be made out; third, deed to be given in form adopted 25th of October, 1841." The plaintiff, who was present, protested against the sale of his pews, and paid the taxes thereon and expenses, declaring, at the same time, that he should bring an action to recover back the money so paid. He also purchased at the sale fourteen pews belonging to other delinquents, which were sold for taxes assessed in like manner, and for the like purposes, with those on his own pews, and

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received deeds of the same from the society, without objection, in the form prescribed by the by-laws of 1841.

It appeared, by the testimony of the treasurer, that all the taxes since 1835 had been notified and paid quarterly upon the basis of the original appraisal and assessment made in 1823, with an addition of ten per cent which had been made in 1833, and had been since continued, and with occasional temporary additions to the amount, prior to the year 1833, but with no change in the proportions; and it was admitted by the plaintiff, that all the taxes prior to 1835 had been collected in like manner, and upon the same original appraisal and assessment, with the addition of the ten per cent in 1833. It appeared by the records, that accounts of the taxes received quarterly, and of the expenditures incurred, had been yearly rendered by the treasurer to the standing committee and proprietors, since the year 1835, which accounts had also been annually approved by the committee and the proprietors; that the doings of the standing committee, for the same time, had been uniformly approved at the quarterly meetings of the proprietors, down to and including the 25th of April, 1841; that the proprietors, at their several annual meetings, had fixed the salary of their minister by vote; and that no protest or objection against any proceeding had been made by the plaintiff, till the sale of his pews, except on the occasion of the settlement of Mr. Gray, in 1839, and the meeting of October 25th, 1841.

It did not appear, that any record had been made of a computation of the expenses, and of an assessment of taxes, during the years 1839 and 1840, or subsequently until July, 1841; when, at a meeting of the standing committee held on the 13th, it was voted, that a subcommittee be appointed to compute the expenses of the society, and to assess them on the pews, according to the appraisal. The subcommittee subsequently computed the expenses for the year 1841, and reported the same to the standing committee, who thereupon voted, that the sum so ascertained be ratably levied and

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assessed on the pews, according to the assessment and appraisal of 1823.

No subsequent computation and assessment were made until July 12th, 1842, when a similar proceeding took place with reference to the expenses for the year ending May, 1843.

The plaintiff paid the taxes on his first purchased pew, from the 12th of February, 1839, to the 12th of February, 1840, without protest or objection. From the last mentioned date, he refused to pay the taxes on that pew, and those also assessed on the two others purchased by him March 13th, 1840, to the day of the sale, June 7th, 1842. The taxes, for payment of which the plaintiff's pews would then have been sold, if he had not paid the same, were due on one pew, ten quarters from February 12th, 1840, to May 12th, 1842, and eight quarters on each of the other pews from August 12th, 1840, to May 12th, 1842. The sum paid by the plaintiff included the taxes, interest, and expenses.

The plaintiff, in the course of the trial, proposed to introduce evidence to show, that the taxes assessed since the fall of 1839, for the recovery of which the suit was brought, were raised and in part appropriated to pay the salary of the Rev. Mr. Gray, a minister of the Unitarian denomination, who was settled over the society in October, 1839; that the settlement of Mr. Gray was illegal and void; and that the taxes had consequently been raised for an illegal purpose. But the court ruled, that the validity of Mr. Gray's settlement could not be tried in this action.

The defendants offered to prove, that the records of March 18th, 1838, had been altered without authority, and that the vote on the acceptance of the report of the standing committee, respecting a change of name, was, in fact, nineteen to one, and was originally so recorded, and that the number of the votes in the negative had been altered from one to eleven. But the court ruled, that evidence to contradict the record in this particular, was inadmissible.

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The cause was argued at a former term, by *B. Rand, C. H. Warren & A. H. Fiske*, for the plaintiff, and by *C. G. Loring & W. Dehon*, for the defendants.

WILDE, J. This case has been elaborately argued by counsel, and numerous questions have been referred to the consideration of the court, some of which are not free from difficulty, and have required time for deliberation.

The action is assumpsit, to recover money alleged to have been paid by the plaintiff under protest, and by compulsion, to prevent his pews from being sold, for the non-payment of taxes thereon assessed.

The general question is, whether these taxes were legally assessed. The plaintiff's counsel contend, that they were not, either in pursuance of any statute provision, or the by-laws of the defendant society. On the other hand, the defendants contend, that they were fully authorized to levy these taxes on the pews in their meeting-house, and that they were legally assessed, in conformity with the by-laws of the society. In January, 1823, the defendants were incorporated as a religious society in the city of Boston, with all the powers, privileges, and immunities to which other religious societies in this commonwealth are entitled by law. The society, being duly organized, proceeded, at a proprietors' meeting, to appoint a committee to appraise the pews in the meeting-house and assess the same; to cause all the pews to be offered for sale; but to sell no pew under the appraisal. This was accordingly done, and a report thereof was made by the committee to the proprietors.

Every pew in the meeting-house was appraised, and the proportion to be paid by the proprietor thereof, of all taxes to be levied for defraying the expenses of the society, was duly fixed and assessed. And afterwards deeds were given in the following form. [Here the judge repeated the language of the deed on page 151.]

It appeared, at the trial, that all taxes from and after 1823 had been uniformly levied and paid, upon the basis of the original appraisal and assessment, without any new appraisal

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or change of assessment, excepting occasional additions, in particular cases, and one regular addition of ten per cent since 1833, all which were voted by the proprietors.

In 1839, the plaintiff purchased his pews, and received his deeds in the usual form, containing a condition which the plaintiff was to perform, or the pews, according to the express terms of the deed, would revert to the society, unless the condition was illegal. The plaintiff's counsel contend, that the condition was illegal and void, on the ground that the society had no right, by their charter, to assess any tax in this form. The charter did not prescribe the mode of taxation and assessment, and the society had the right to prescribe any mode not prohibited by law. We do not think this depends upon any custom of the religious corporations of the city of Boston, to levy taxes in this manner; for, unquestionably, the pew-holders had a right to consent to such taxation; and they all did consent, by receiving deeds expressly authorizing the taxes to defray the expenses of the society, to be assessed and levied upon their several pews. By the charter, the society were empowered to purchase, hold, and dispose of any estate, real or personal, for their use, provided the annual income thereof should not exceed, at any time, the value of four thousand dollars. The society, therefore, had as good a right to convey the pews on condition of the payment of taxes, as they had to lease them for a certain rent.

But it was argued, that by the *St.* of 1786, *c.* 10, §§ 1, 2, taxes for the support of a minister, for building and repairing the house of public worship, and for sacred music, might be raised by any town, district, parish, precinct, or other body politic and religious society, in any legal meeting, which taxes are to be assessed upon all the ratable polls and property, within each particular corporation or society. But this statute does not prohibit the assessment of taxes on pews; on the contrary, there is an express proviso "that nothing shall take from any society in Boston, or any other town, the right and liberty to support worship by a tax on pews, or other

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established mode." And there is no statute which prescribes the particular mode in which taxes are to be assessed, and consequently such societies had the right to levy taxes in any reasonable manner they might see fit to adopt.

Another objection to the right of the defendants to impose the condition in the deeds to the plaintiff is, that the change of the name of the corporation was unauthorized, as it changed the fundamental constitution of the society, and was void. "If the change were valid," it is said, "the former society had no legal existence; and if it were void, the latter had no legal existence." This objection has been elaborately argued, but it appears to the court to be entirely unfounded; for, if the Bulfinch Street Society had no title, they could convey none to the plaintiff; and he has no other title. And, furthermore, as he has had possession of his pews, and his title has never been disturbed or questioned, he is estopped to deny the right of the society to make the conveyance. If he has no title to the pews, he certainly cannot maintain this action. If the plaintiff held his pews under conveyances from the society, before the change of the name of the corporation, he would have the right, no doubt, to question the regularity and validity of the proceedings of the society in this respect. Whether the objections urged in such case would avail, is a question which is not raised by the facts reported in this case. It was argued, for the plaintiff, that by taking an assignment from some of the original proprietors, he succeeded to their rights. But this argument cannot be maintained, for he voluntarily relinquished that title, and took a new title from the society, after the change of their name.

Another objection to the condition of the deeds is, that a corporation has no power to enforce a forfeiture, unless it is given by their charter. But, admitting this principle, it does not apply to the present case; for all the proprietors of pews assented to the condition by receiving their deeds. It is a part of the contract between the parties; and, besides, the breach of the condition is not a forfeiture in the nature of a

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penalty; the title of the pews reverted to the society merely for the purpose of obtaining payment of the taxes thereon due; and after a sale, the taxes were to be deducted from the avails of the sale, and the surplus was to be paid over to the plaintiff.

We are therefore clearly of opinion, that the society had the right to tax the pews; and this right, although not expressly given, is conferred by necessary implication. By the charter, the corporation were to have and enjoy all the privileges, powers, and immunities, to which other religious societies in this commonwealth are entitled by law.

The fallacy of the argument for the plaintiff on this point is, that it proceeds on the assumption, that no tax on pews can be valid, unless the power to levy taxes in that mode is given by statute. Whereas they have clearly the right to let or sell the pews, on the condition that the lessee or grantee shall pay a certain sum yearly, or to pay taxes if lawfully assessed. There is no principle of law by which such a condition can be held void. The act required to be done is neither *malum in se*, nor *malum prohibitum*, nor against the policy of the law.

The next question is, whether these taxes were lawfully assessed by a legal vote of the society, according to their by-laws.

The plaintiff's counsel contend that they were not for several reasons.

In the first place, it is objected that the taxes were assessed by the standing committee, and not by the corporation. This is a mere formal objection. By the by-laws, article 3d, the standing committee are authorized to assess taxes on the pews according to their appraisal. If this by-law is valid, then the taxes were assessed by a legal vote of the society. It appears by the report, that a committee of the society did appraise and assess the pews, as they were authorized to do, and did report their appraisal and assessment to the society, and that the society adopted the appraisal and assessment so made. This was undoubtedly intended as a permanent

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assessment on the pews, subject to such changes as might be afterwards made by the society. And so the taxes have been levied ever since; they have therefore been assessed according to the votes of the society. But it has been argued that annual assessments were required; and, from a literal construction of the language of the condition, such an inference might be made; but, considering all the proceedings of the society, and the facts reported, we think the true meaning is, that the taxes were to be laid on the pews according to the permanent assessment, or according to any alterations therein, which might from time to time be made by the society. Such was the construction adopted by the parties, and it was never questioned, until this controversy arose. Another objection is, that the committee did not compute the expenses of the society before assessing them, as they were required to do. The defendants' answer to this objection is, that "the society have yearly approved the accounts of the treasurer, showing the amounts of the taxes and the expenditures, and have quarterly approved the doings of the standing committee, whose duty it was to approve the expenditures before they were made, and to compute the expenses and assess them on the pews; and that this course of proceedings is equivalent to a legal vote on the subject, and is in the fullest sense a ratification of all that was done." This seems to us a satisfactory answer. Indeed, if the tax was made according to a just computation of the expenditures and expenses, it is immaterial when the computation was made.

Again, it is objected that these taxes were not laid solely "for the support of the minister, repairs of the house, and other necessary expenses," and that if any part of the taxes were laid for any other purpose, they would be illegal. This, no doubt, would be a valid objection, if the fact were proved; but there is no evidence to that effect, and the misapplication of the moneys raised by the taxes is not to be presumed.

Some other objections have been made to the proceedings of the committee, as not being conformable to the by-laws,

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which do not require particular notice. They do not affect, in our judgment, the validity of the taxes, and they have been satisfactorily answered by the defendants' counsel.

We are then brought to the consideration of the important question, whether these by-laws are valid. The plaintiff's counsel insist that they are not; they being inconsistent with and repugnant to the provisions contained in the Rev. Sts. c. 20, with which provisions only the defendants were bound to comply. And, unquestionably, if these by-laws are repugnant to the law of the land, they are utterly void, and the taxes were illegally assessed. The question then is, whether the provisions of the Rev. Sts. c. 20 are to be so construed, as to extend to and regulate the proceedings of this and other religious societies, which have a right to assess taxes on the pews of the proprietors. By § 7, it is enacted, that "the qualified voters of every parish and incorporated religious society, and of every religious society organized according to the provisions of this chapter, shall meet in the month of March or April annually, at such time and place as shall be appointed by their assessors, and shall choose a clerk, and two or more assessors, a treasurer, collector, who shall be sworn, and such other officers as they shall think necessary; all of whom shall continue in office for one year, and until others are chosen and qualified in their stead." And by § 30, it is provided, "that the assessors of every parish and religious society, in assessing taxes for the support of public worship and for other parish charges, shall assess the same upon all the property of all the members of such parish or society."

From these sections, it is inferred, that no tax can be legally assessed but by sworn assessors; but by reference to other sections in the act it is obvious, we think, that no such inference was intended. For by §§ 31 and 32, it is expressly provided, that moneys for certain purposes may be assessed on pews. We think, therefore, that §§ 7 and 30 had reference only to § 28, which provides "that the qualified voters of every parish or religious society may grant and vote such

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sums of money as they shall judge necessary for the settlement, maintenance, and support of ministers or public teachers of religion; for the building or repairing of houses of public worship, and for all other parish charges; all which sums shall be assessed on the polls and estates of all the members of the parish or society, in the same manner and proportion as town taxes are assessed." But it was left optional with the parish or society to raise moneys for the purposes named, to be assessed on the polls and estates, or to assess the same on pews, if they elect and have a right so to do; and, in the latter case, §§ 7 and 30 are not applicable. This seems to have been the intention of the legislature, for it is expressly provided by §§ 31 and 32, that pews may be taxed for the *repairs* of any meeting-house, or other house of public worship, while by § 18 moneys raised for repairing meeting-houses are to be assessed on the polls or estates of all the members of the parish or religious society. By the plaintiff's construction these sections would be repugnant. So § 19 provides, that nothing contained in this chapter shall enlarge or diminish the powers of taxation, enjoyed by any parish or religious society, by virtue of any special law or act of incorporation.

There were then many such parishes and religious societies in the commonwealth; so that it was not intended, that all taxes should be assessed on the polls and estates, in the manner directed in the other sections. The second section is still more comprehensive. That provides, that "all parishes and religious societies, whether corporate or unincorporate, shall continue to have and enjoy their existing rights, privileges, and immunities, except so far as the same may be limited or modified by the provisions of this chapter, and the eleventh article of the amendments of the constitution." It is true, that the defendants' act of incorporation does not authorize them to assess taxes on pews, without the consent of the proprietors, as many other acts of incorporation do; nor do they claim any such right. But they had the right to tax pews with the consent of all the proprietors, as I think has been

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abundantly shown, and this right they continued to have and enjoy. Neither by the Rev. Sts., nor by any former statute, is the taxation of pews prohibited; on the contrary, it is provided by the *St.* of 1799, *c.* 87, § 5, that nothing in that act contained shall take from any church or religious society in the town of Boston, or any other town, the right and liberty to support the public worship of God by a tax on pews, or other established mode. And the same right and liberty are recognized in a provincial statute. But, without these statutes, the defendants had a right to assess taxes on pews with the assent of all the proprietors. This is not denied by the plaintiff's counsel. In their opening argument, they say, if the society had the authority to insert these conditions relative to taxation in their deeds, or if they received the assent of all the proprietors, it is supposed, that they will be mutually binding on the society and the proprietors; if not, then the general law regarding the taxation of pews will be applicable; and, unquestionably, so is the law. The defendants, being owners of their meeting-house, had the right of selling their pews on condition of the payment of a certain sum annually, or of an annual tax; and to this condition all the proprietors of the pews assented, by purchasing and receiving conveyances of their pews. The condition does not differ, in principle, from the reservation of a rent charge on a feoffment or other conveyance in fee, or the reservation of rent on a lease; and that such contracts are lawful contracts cannot, we think, admit of a reasonable doubt. This right of the defendants existed at the time of the Rev. Sts.; and by § 2 of *c.* 20, before referred to, it is provided, that they shall enjoy their existing rights, privileges, and immunities, with certain exceptions, which do not apply to this case, when rightly construed. We are therefore of opinion, that the taxes were rightly assessed, according to the by-laws; and that on the breach of the condition, the pews of the plaintiff reverted to the society, who were authorized to sell them according to their by-laws. It is objected, that some of the taxes required to be paid by the plaintiff, and which were paid, had

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not been due and unpaid a year before the time of sale; and that the defendants had not the right to sell the pews for the payment of such taxes. The answer is, that, at the time of the advertisement of the pews for sale, some of the taxes thereon had been due for more than a year, and were unpaid, whereby the pews reverted to the society, and authorized a sale; and then, by the express terms of the deeds, the society were authorized to deduct what might be due to them with incidental charges; and this includes all taxes legally assessed, whether due for more than a year or not: otherwise, the society would have no security for the taxes which had not been due for a year before the time of sale.

With regard to the notice of sale, it may be well doubted, whether, if it were defective, the plaintiff could avail himself of any exception to it in support of this action. It does not appear, that he made any objection to the notice before he paid the taxes; if he had, the defendants might have given a new notice. His objection was, we presume, to the legality of the taxes, for that was the main question in dispute. His objection was to the sale on any notice; and if the plaintiff had not paid the taxes, the defendants might have concluded to take him at his word, and leave him to try his title to the pews by an action. The pews were the defendants' property, and if the plaintiff would not pay the taxes, and did not request a sale, they might continue to hold them, until they should be requested by the plaintiff to make a sale.

It is not, however, necessary to express an opinion on this point; for we can perceive no defect in the notice. It is conformable to the by-laws as altered in 1838, before the time when the plaintiff purchased his pews; and it is conformable also to the by-laws as afterwards altered in 1841.

In conclusion, taking into consideration all the questions and matters discussed by counsel, although some questions have not been particularly noticed, we are of opinion that this action cannot be maintained.

Exceptions overruled.

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JOSHUA JENNISON *vs.* CHARLES F. STAFFORD.

A promise to forbear, for six months, to sue a third person, on a just cause of action, is a valid and sufficient consideration for a promissory note.

In a suit, by the payee against the maker, on a promissory note, given in consideration of a promise to forbear to sue a third person for six months, the burden of proof is not on the payee, to show that he has forborne according to his promise, but on the maker, to show that he has not.

THIS case came before the court on exceptions taken to the rulings and instructions of the judge of the court of common pleas, before whom it was tried.

The bill of exceptions is as follows:

"This was an action of assumpsit. The writ contained the money counts, and also a specification of claim or bill of particulars, setting forth a note signed by defendant, dated February 19th, 1845, whereby, for value received, he promised to pay to the plaintiff, or order, the sum of three hundred dollars in six months. And at the trial, the plaintiff offered the said note in evidence to prove his case.

"The defendant then contended that said note was given without consideration, and introduced evidence tending to show that no consideration for said promise did in fact exist.

"The plaintiff, then, to avoid the effect of the evidence of the defendant, alleged and introduced evidence to support his allegation, that the defendant had agreed to pay him the contents of said note at the time and in the manner therein set forth, if plaintiff would forbear to sue one J. C. Stafford, defendant's brother, on a demand for three hundred dollars, until the expiration of six months from said 19th day of February.

"There was evidence tending to show, that such forbearance on the part of the plaintiff would have been an actual benefit to defendant. There was evidence tending to show, that said J. C. Stafford had had some interest in property in New Hampshire, and also that said Stafford, during the whole of said term, was absent in Wisconsin, or some other of the Western States.

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"The court ruled, that if the jury were satisfied, upon the whole evidence in the case, that there was such an agreement, and that such agreement was an actual benefit to defendant, it constituted a sufficient consideration for the note, and that plaintiff could maintain this action upon such agreement.

"It also appeared that the plaintiff agreed, that if defendant would pay the note in suit, plaintiff would discharge his said claim against J. C. Stafford.

"The defendant requested the judge to instruct the jury, that the burden of proof was, in the first instance, upon the plaintiff to show that he had so forborne to sue the said J. C. Stafford for said term of six months.

"But the judge refused to give such instructions, and ruled that it was for defendant to show that plaintiff had commenced a suit against said J. C. Stafford within said period."

W. Sohier, for the defendant.

M. S. Clarke, for the plaintiff.

METCALF, J. Though these exceptions are not wholly free from obscurity, we understand that they mean simply this: That it was ruled by the judge, that a promissory note, payable in six months from date, given in consideration of the payee's promise to forbear, for six months, to sue a third person on a just cause of action, is founded on a valid and sufficient consideration; and that, in a suit by the payee against the maker, to recover the amount of the note, the burden of proof is not on him to show that he has forborne according to his promise, but that it is for the maker to show that the payee has not so forborne.

Upon this understanding of the exceptions, we are of opinion that they cannot be sustained. The ruling as to the consideration of the note was clearly right. 1 Steph. N. P. 255. And we think the ruling as to the burden of proof was also right. It was, in effect, nothing more nor less than a ruling, that, in a suit to recover the sum mentioned in a promissory note, the burden of proving a failure of the con-

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sideration of the note is on the maker, and not on the payee. Such a note is presumed to be founded on a valid and sufficient consideration, and the burden of proof is on the maker to establish the contrary. Chit. on Bills, (10th Amer. ed.) 68; Story on Notes, § 181. *A fortiori*, we think, is the burden on him to show a failure of the consideration. The argument of the defendant's counsel, on this point, would have been conclusive, if the plaintiff had brought an action on a promise by the defendant to pay a sum of money, in consideration that the plaintiff would forbear to sue the defendant's brother. In such action, the plaintiff must have averred, and must have proved in the first instance, that he had forborne according to his promise.

Exceptions overruled.

JOHN C. ADAMS *vs.* HARRISON PORTER.

The defendant, in a bill of discovery, is not bound to answer any interrogatories, which may be used as evidence against him on a criminal charge.

The allegation of combination and fraud should be omitted in a bill of discovery.

The rule of the English courts of equity, that the plaintiff in a bill of discovery "shall only have a discovery of what is necessary to his own title, and shall not pry into the title of the defendant" (Cooper Eq. P. 58), is not applicable in this commonwealth.

The assignee of an insolvent debtor, who has commenced an action of trover for the recovery of personal property, mortgaged by the insolvent before his insolvency, may maintain a bill of discovery against the mortgagee, for the purpose of obtaining evidence to impeach the title of the latter.

Where the defendant in a bill of discovery demurred, and the demurrer was sustained as to certain formal parts of the bill, and was overruled as to the residue, and was then withdrawn, and the bill amended, it was held, that the defendant, notwithstanding the delay produced by filing the demurrer, should be entitled to his costs, on filing full and proper answers.

THIS was a bill in equity for a discovery.

The plaintiff alleged, that, on the 14th day of June, 1845, David Woods and Stephen Cobb, traders and partners, under the firm of Woods and Cobb, made an application to Bradford Sumner, a master in chancery, for the benefit of the statutes for the relief of insolvent debtors, by a "petition, which was

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duly heard and received, and upon which the usual proceedings took place:" That, at the first meeting of the creditors, the plaintiff was duly chosen assignee of the estate of the insolvents, and duly entered upon the duties of his trust, and has continued therein, and still continues to be such assignee: That, on the 7th day of June, 1845, a few days only previous to the application of the insolvents to the master in chancery, the defendant, "combining and confederating with certain persons, to the plaintiff unknown, did fraudulently and designedly make with the said firm a certain pretended mortgage of a large part of the personal property of the said firm," which was duly recorded in the office of the city clerk of Boston: That the defendant took the property included in the mortgage into his possession, and converted it to his own use, and refuses to deliver the same or any part of it to the plaintiff: That the plaintiff, as assignee, commenced an action of trover, in the usual form, and setting forth a proper and sufficient cause of action, against the defendant, to recover the value of the property so taken and converted, which action is pending in this court: That, by reason of the secrecy and conniving of the defendant and the insolvents with others unknown to the plaintiff, he is unable to show the real nature of the transaction, which is the subject of his action, in a court of law, without the aid of a court of equity: That the plaintiff is informed and believes, that the mortgage from the insolvents to the defendant was without consideration and void; that the defendant never paid the insolvents the sum of eight hundred dollars, recited in the mortgage as the consideration thereof, but received the goods therein mentioned to his own use, without rendering such equivalent therefor; that the defendant, at the time of the making of the mortgage, knew that the insolvents were in failing circumstances; that the mortgage was made by the insolvents with full knowledge of their insolvency and contemplated failure; that the defendant was not present at the executing and making of the mortgage, and that the same was made without his knowledge and consent; that the defendant

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never saw the goods included in the mortgage; that he was never in the store or place of business of the insolvents before or at the time of the making of the mortgage, nor until a long time after the failure of the insolvents; and that the defendant did not, at the time, know the value of the goods included in the mortgage, but was wholly unacquaint ed therewith.

The prayer of the bill was, that the defendant might answer, on oath, as to all the matters stated therein; and, further, as to his dealings and affairs with the insolvents, previous to and at the time of the making of the mortgage, — whether the insolvents were then indebted to him, and to what amount, — whether, and to whom, if at all, the consideration of the mortgage was paid, in what sums, and at what times, — what was the value of the goods mortgaged, — what value thereof had come to his hands, — what part had been sold, — to whose use, the proceeds had come, — whether to the use of any other person than the defendant, — whether the insolvents, or either of them, or any person on their behalf, had received any part thereof, — whether, since the mortgage, there had been any dealings between the defendant and the insolvents, — what is the condition of that part of the mortgaged property, which remains unsold, — whether any of the goods have been exchanged or disposed of in any other way than for money, — whether the defendant, before and at the time of the mortgage, did not know that the insolvents were in failing circumstances, — whether the defendant was present at the making of the mortgage, — whether it was not made without his knowledge and consent, — whether he ever saw the goods included in the mortgage, until after it was made, &c.

The defendant demurred, and showed for cause, that the bill does not set forth any title in the plaintiff to the property, which is the subject of his action at law; that the facts sought to be discovered are not necessary or material to support the action; and that they are not matters which lie only in the knowledge of the defendant.

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J. C. Adams, for himself.

D. H. Mason, for the defendant.

Dewey, J. Various objections are taken, and urged as causes of demurrer, to this bill.

1. It is said, that the title of the plaintiff is insufficiently set forth. The bill merely alleges, that the insolvents, Woods and Cobb, filed their petition for proceedings in insolvency, before Bradford Sumner, a master in chancery; that the usual proceedings took place thereupon; that, at the first meeting of the creditors, the plaintiff was chosen assignee; and that he entered upon the duties of his trust, and continued, and still continues, to be such assignee. But the bill does not allege an assignment to the plaintiff, by a deed from the master in chancery, of the estate of the insolvents. Such an assignment is required by the statute, and is a necessary part of the proceedings to vest the estate of the insolvents in the assignee, and to authorize him to litigate the title thereto. The appointment of an assignee does not, of itself, vest the property in him.

If the proceedings before the master are necessary to be recited in the bill at all, and if it would be insufficient to describe the plaintiff merely as the assignee of Woods and Cobb, leaving all other matters to be shown by proof, in the progress of the cause, the deed of assignment should be recited in the bill, as it is one of the necessary steps, in order to show the right of the plaintiff to institute the suit at law, in aid of which the bill of discovery is brought. As the bill must be amended for another cause, as will be seen hereafter, it may also be amended in this particular; and this objection, therefore, need be no further considered.

2 It is further objected to the bill, that it charges a conspiracy, and seeks a disclosure from the defendant of facts, which may implicate him as a party to such conspiracy. If such be a correct view of the allegations in the bill, this objection would be well taken, as no one is bound to make answer to interrogatories, in a bill of discovery

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which may be used as evidence against him on a criminal charge. The allegation of an unlawful confederation or conspiracy, which is usually introduced into bills in equity, is rather to be considered, however, as constituting a merely formal part of the bill, and requiring no particular answer. If the bill be objectionable, as containing an allegation of a conspiracy, and seeking to procure evidence from the defendant to sustain such allegation, it is so principally from the effect to be given to the rule of this court, (Chancery, Rule 4,) which provides, that the allegation of combination and fraud shall be omitted in all bills, in which no actual fraud or combination is specifically charged. Perhaps, even under our rules, this might be considered as a mere formal allegation, and not an actual charge of a criminal conspiracy; but, however this may be, we think the allegation should be omitted in a bill of discovery, and that the bill should be amended by striking out this allegation.

3. The remaining objection is one of substance, which goes directly to the question of sustaining a bill of discovery, for the purposes for which the present bill was filed. The leading object of the bill is to interrogate the defendant as to the various dealings between him and the insolvent debtors, Woods and Cobb, with a view of obtaining answers, either to be used as evidence in themselves, or to aid the plaintiff in procuring other evidence, to impeach a certain mortgage title of the defendant, by force of which he claims to hold certain personal property, formerly the property of the insolvents, Woods and Cobb, the mortgage having been made by them before the institution of the proceedings in insolvency.

The defendant denies the right of the plaintiff to make the proposed inquiries, insisting that such inquiries are a violation of the rule in chancery, that a bill of discovery does not lie to inquire into the title of the defendant. The precise extent of the rule does not seem to be very clearly defined; and it is stated with many qualifications and limitations. The leading purpose of it seems to be, to restrain a

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party from using a bill of discovery, as an instrument to pry into, and, by means of the answers thereto, to ascertain, the secret defects of a title under which he does not claim.

How far the rule alluded to would preclude inquiries of the character now proposed, and whether interrogatories not asking the adverse party to inform the plaintiff under what title he claims, but, knowledge of that title being obtained from other sources, as in the present instance from a public record, asking only as to the existence of certain facts, which might avoid a known claim of title, may be questionable. It would be proper also to consider, whether the proposed interrogatories might not be regarded as inquiries relative to facts bearing upon the plaintiff's title, both parties claiming through a common source of title. These inquiries would lead to a particular examination of the extent of the supposed rule, and a consideration of the cases to which it is applicable, if the rule were at all applicable to a case like the present, and in the courts of this commonwealth.

The rule is thus stated in Cooper's Equity Pleading, 58: "The plaintiff shall only have a discovery of what is necessary for his own title, as of deeds he claims under, and not pry into the title of the defendant." See also 2 Ves. Sen. 445; Story Eq. Pleading, § 858. But Cooper also remarks, that "a devisee is entitled, against the heir, to a discovery of deeds relating to the estate, otherwise the heir might defend himself at law, by setting up prior incumbrances, and by that means prevent trying the validity of the will." And again, he says: "But the court will never enable a defendant to commit a fraud by resisting a discovery." Whether this latter principle would not fully open to the plaintiff the inquiry which he seeks, would also be a proper subject for our consideration, if the case required an opinion of this restricted character.

But such inquiries are unnecessary; inasmuch, as assuming the English rule to be what it is supposed to be by the defendant, yet it is not applicable in this commonwealth. Our whole system of inquiry, by the instrumentality of a legal

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proceeding, has been that of full inquiry as to any and all facts, that may impeach the right of property in the party of whom the inquiry is made. This principle is fully applied in the interrogatories, which are allowed to be put to a supposed trustee in the trustee process. No restriction is imposed, and it is competent to ask any question, the answer to which may impeach the party's title to real or personal estate.

A latitude equally broad exists in the interrogatories which may be proposed to one charged with embezzling the property of deceased persons. But the most distinct recognition of this right to a full and searching inquiry into the title of an adversary, is contained in the provisions of the statute of 1846, c. 168, by which it is enacted, that persons, charged with having fraudulently received the property of an insolvent debtor, may be summoned to appear before a master in chancery, and be there examined on oath touching such complaint. This provision is entirely inconsistent with any supposed rule, that a party is to be protected from all inquiry into the validity of his own title, but, on the contrary, authorizes the fullest inquiry; and, though enacted with a view to proceedings before a different tribunal, and in a different form, is nevertheless quite significant, as a legislative declaration of the principle applicable to this subject.

Looking at the whole subject, and in view of the suggestions above stated, the court are of opinion, that the objection taken by the defendant to the general course of the inquiry, and especially to the inquiry as to the title of the defendant, cannot be sustained. The defendant, therefore, upon proper amendments being made to the bill, will proceed to file his answer to all such of the interrogatories, as seek to inquire into the various dealings of the defendant and the insolvents, Woods and Cobb, and as to any property which the defendant may have received from them, and all matters appertaining thereto.

A further question was raised as to costs; the plaintiff insisting that the defendant ought not to recover costs, as he has delayed the proceeding by interposing a demurrer, which

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is now to be withdrawn, and which has been in part overruled. The court are of opinion, that filing this demurrer should not affect the question of costs. The demurrer was well taken, as to certain formal parts of the bill; and, although we should not have been disposed to tax the plaintiff with costs, as a condition upon which an amendment was to be allowed; yet, under the circumstances, we think that when amended the costs must stand upon the usual terms of bills of discovery, and that upon the proper and full answer being filed by the defendant, he will be entitled to his costs

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THE PRESIDENT, DIRECTORS, &C., OF THE DORCHESTER AND MILTON BANK *vs.* THE PRESIDENT, DIRECTORS, &C., OF THE NEW ENGLAND BANK.

An agent has no right to delegate his authority to a sub-agent, without the assent of his principal; but, where from the nature of the agency, a sub-agent must necessarily be employed, the assent of the principal is implied; as, where a draft, payable at a distant place, is left with a bank for collection, it must be presumed, that it is intended to be transmitted to a sub-agent, at the place where it is payable, and not that the bank is to employ its own officers to proceed there, for the purpose of obtaining payment.

A bank, by which notes and bills, payable at a distant place, are received for collection, without specific instructions, is bound to transmit or to cause the same to be transmitted, by suitable sub-agents, to some suitable bank, or other agent, at the place of payment, for that purpose; and where suitable sub-agents are thus employed, in good faith, the collecting bank is not liable for their neglect or default.

The D. and M. Bank, at Milton, in this state, having discounted a number of drafts, payable in Washington, in the District of Columbia, transferred the same, by a general indorsement, and without any specific instructions, to the N. E. Bank, in Boston, their general agents, for collection: the latter, having no correspondent in W., transferred the drafts, by a like general indorsement, to the C. Bank, in Boston, then and afterwards in good credit, for collection: the C. Bank transmitted the drafts to their correspondent, the Bank of the M., in W., for the same purpose: the C. Bank having subsequently failed, the N. E. Bank demanded the drafts of the B. of the M. before they became due: the latter refused to deliver the drafts, but collected them, and applied the proceeds to the payment of a balance due them from the C. Bank; whereupon the N. E. Bank commenced an action against the Bank of the M. to recover the amount: — it was held, 1, that the N. E. Bank, having acted in good faith, and the C. Bank being a suitable agent, had authority to employ the latter to make the collection; 2, that no proof of general usage was necessary to give the N. E.

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Bank such authority; and, 3, that, as the drafts were transferred to the N. E. Bank, by a general indorsement, that bank might transfer them in the same manner to the C. Bank, and were not bound to make a restricted indorsement.

This was an action of assumpsit, for the recovery of damages by the plaintiffs against the defendants, for not accounting for the proceeds of certain accepted bills of exchange, payable at Washington, in the District of Columbia, in six months from their respective dates, which had been received by the defendants from the plaintiffs, for collection.

On the trial, in this court, before *Wilde*, J., the following facts appeared in evidence. On the part of the plaintiffs, it was proved, that the bills in question had been discounted by them, and left, at different times during the months of October, November, and December, 1837, for collection, with the defendants, who were their general agents in Boston; that the defendants had never paid over the amount of the bills, or returned them to the plaintiffs; that the defendants always charged the plaintiffs a commission for making collections out of Boston; and that the plaintiffs, on the 21st February, 1844, demanded of the defendants, that the proceeds of the bills should be placed to their credit.

On the part of the defendants, it was proved, that, from the year 1833, or 1834, until the failure of the Commonwealth Bank, they had employed that bank to make collections for them and their customers, at Washington and other places at the south, where the defendants had no agent; that they placed the bills received by them of the plaintiffs in the hands of the Commonwealth Bank for collection — first indorsing them thus, "Pay to C. Hood, cashier," — which was the form of indorsement uniformly adopted by them, in such cases; that the Commonwealth Bank then was, and to the time of its failure, January 11th, 1838, continued to be, in good credit; that the bills in question were duly transmitted by the Commonwealth Bank to its correspondent in Washington, the Bank of the Metropolis; that all the bills had been accepted but none of them had become due on the 11th of January, 1838, when the Commonwealth Bank

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stopped payment; that on the 13th of January, the defendants took measures to demand the bills of the Bank of the Metropolis; that the latter refused to deliver the bills, but afterwards collected them, and claimed to hold the proceeds, on account of a balance due to them from the Commonwealth Bank; and that the defendants, thereupon, commenced a suit for the recovery of the proceeds of the said bills against the Bank of the Metropolis; which suit, at the time of the trial, was still pending, and the record of which is in the case, and may be referred to, subject to any legal objections thereto by the plaintiffs.*

It was also proved, on the part of the defendants, that, in 1833 or 1834, the several banks employed by the government of the United States, as deposit banks, entered upon a system of mutual dealings, for the purpose of facilitating exchanges and transfers of funds; that the Commonwealth Bank was one of these banks, and was frequently employed by other banks, in Boston and elsewhere, to collect money in places, (especially at the south and west, where the latter had no correspondents,) and that in all such cases, bills received for collection were indorsed in the manner above mentioned; and that, since that time, it had been the general practice of the banks in Boston, whenever any one of them received notes or drafts for collection, which were payable at a place where it had no correspondent, to pass over the same for collection to some other bank in Boston, which had a correspondent in such place, by a general indorsement, exactly like that made use of in indorsing the bills in question to the Commonwealth Bank.

There was no evidence, that any loss had ever happened, in consequence of the failure of a bank, in which bills or drafts had been thus deposited for collection; or that the owner of any such note or draft had in any instance sustained a loss, in consequence of a failure of the collecting bank. It was proved, that, although it was the general practice of the

* See 1 Howard, 234; 6 Ib. 212.

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banks in Boston, to receive bills and notes for collection, which were payable in places, where they had no correspondents, yet that they sometimes refused to undertake the collection of such paper.

The cashier of the plaintiffs testified, that in the course of business at their bank, within the last eight or ten years, they had discounted and received a large quanitity of southern and other drafts, though not to a great amount on Washington, all of which were collected through the New England Bank; that, in three or four instances, within the period mentioned, protested drafts had been returned to the plaintiffs by the New England Bank, from which it appeared, that that bank had indorsed bills and drafts, received by it for collection, to other banks in Boston, in the same form in which the bills were indorsed to the Commonwealth Bank; and that the plaintiff had never found any fault with, or protested against, the employment by the defendants of other banks in Boston, though the witness could not say, with certainty, whether any such instances had occurred before the bills in question were placed in the hands of the defendants.

The cashier of the defendants produced and verified the protest of a draft sent by the plaintiffs to the defendants for collection, in Mobile, in May, 1836, and a copy of the defendants' letter, returning the same with a protest to the plaintiffs; which draft was indorsed by the plaintiffs,* and by the defendants, in the same manner with the bills now in question, to the cashier of the Merchants Bank in Boston, to which it was sent for collection.

On these facts, the case was withdrawn by consent from the jury, and submitted for consideration to the whole court, who are to order a nonsuit, default, or new trial, as, in their judgment, the case may require.

* In the argument for the defendants, and in the opinion of the court, it is stated, that the bills were indorsed by the plaintiffs to the defendants, in the same manner that they were indorsed by the defendants to the Commonwealth Bank; but the fact does not distinctly appear from the evidence contained in the statement of the case.

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R. Fletcher, for the plaintiffs. 1. The defendants, having themselves a mere delegated authority, could not delegate it to the Commonwealth Bank. There is a distinction between the employment of servants or sub-agents, and a delegation of the entire authority of the defendants to another bank. Paley on Agency, 176; *Solly* v. *Rathbone*, 2 M. & Sel. 298; *Cockran* v. *Irlam*, Same, 301; *Catlin* v. *Bell*, 4 Camp. 183. The plaintiffs had a particular confidence in the defendants, and it was a breach of trust on the part of the latter, to substitute any other bank in their place, without the plaintiffs' consent.

It is not denied, that, where the employment of a sub-agent is necessary, the agent is not responsible, provided he make a fit and proper selection. If the defendants had sent directly to Washington, and there selected and employed a proper person, they would not have been responsible. Where banks have been employed to collect notes and drafts, the cases have gone only to the extent of holding, that such paper may be sent to a suitable agent, but not to the length, that the bank employed may turn over its whole authority to some other bank. *Allen* v. *Merchants Bank*, 15 Wend. 482; *Fabens* v. *Mercantile Bank*, 23 Pick. 330.

2. The defendants have made themselves liable by their mode of indorsement, which, being general, passed the property in the bills to the Commonwealth Bank. Such an indorsement was wholly unnecessary. If the form had been, — "Pay to C. Hood, cashier, for the use of the Dorchester and Milton Bank," — the plaintiffs would not have lost their money. It was on the ground of this general indorsement, that the defendants failed to recover against the Bank of the Metropolis. See *New England Bank* v. *Bank of the Metropolis*, 1 Howard, 234, and the remarks of chief justice Taney, on pages 239, 240. Restricted indorsements are familiar. See Bayley on Bills (2d Am. ed.) 107; Story on Prom. Notes, §§ 143, 144; Story on Bills, §§ 211, 212. A restricted indorsement in the present case would have saved the property. *Sigourney* v. *Lloyd*, 8 Barn. & Cr. 622

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Lloyd v. *Sigourney*, 5 Bing. 525; *Robertson* v. *Kensington*, 4 Taunt. 30; Bayley on Bills, 107, 108; *Wilson* v. *Holmes*, 5 Mass. 543; *Phipps* v. *Millbury Bank*, 8 Met. 79, 84; *Jackson* v. *Union Bank of Maryland*, 6 Harr. & J. 146; *East Haddam Bank* v. *Scovil*, 12 Conn. 303; *Mechanics Bank* v. *Earp*, 4 Rawle, 384; *Allen* v. *Merchants Bank*, 15 Wend. 482, and 22 Wend. 215.

In New York, a collecting bank is held responsible for its sub-agents, even to the extent of the neglect of a notary. *Allen* v. *Merchants Bank*, above cited. As to the liability of banks for the acts of sub-agents: See *Bank of Washington* v. *Triplett*, 1 Peters, 25; *Bellemire* v. *Bank of the U. S.* 4 Wharton, 105, 113; *Same case*, 1 Miles, 173; *Mech. B.* v. *Merch. B.* 6 Met. 13; *Van Wart* v. *Woolley*, 3 Barn. & Cres. 439; *Downer* v. *Madison Co. Bank*, 6 Hill, 648; *Thompson* v. *Bank of So. Car.* Riley, 81; *Taber* v. *Perrot*, 2 Gall. 565; *Canal B.* v. *Bank of Albany*, 1 Hill, 287.

3. The defendants justify their proceedings upon the ground of a supposed usage, that, where a bank employed to collect notes, drafts, bills, &c., has no correspondent at the place where the collection is to be made, it may turn over its employment to some other bank, which has such a correspondent. But this custom, as shown by the evidence, cannot affect the liability of the defendants.

In the first place, the usage being a recent one, knowledge of it is not to be presumed, and none is in fact proved. If a custom is so ancient as to be generally known, that is enough. 3 Wash. C. C. 150. But a single act, — which is all that is proved, — cannot make a custom; nor is it evidence of knowledge of the existence of a custom. *Duvall* v. *Farmers Bank*, 9 Gill & J. 31. The cases, in which the usage of a bank has been held to affect parties, all go upon the ground of a knowledge of the usage. See *Peirce* v. *Butler*, 14 Mass. 303; Bayley on Bills, 242, 243. In the case of *Whitwell* v. *Johnson*, 17 Mass. 449, which seems otherwise, the maker had knowledge of the usage, although the indorser, who was the party bound by it, had not. See also *Halls* v

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Howell, 1 Harp. 426; *Wood* v. *Hickok*, 2 Wend. 501; *Stevens* v. *Reeves*, 9 Pick. 198.

Secondly, the usage is bad, because it is in violation of two well settled principles, already adverted to, namely, that an agent, though he may appoint a sub-agent, cannot delegate his entire authority; and that an agent has no right to transfer the property in the things intrusted to him. The cases, in which the general principle is established, are numerous. *Strong* v. *Bliss*, 6 Met. 393; *Dykers* v. *Allen*, 7 Hill, 497; *Rapp* v. *Palmer*, 3 Watts, 178; *Leuckart* v. *Cooper*, 3 Scott, 521; *Homer* v. *Dorr*, 10 Mass. 26; *Eager* v. *Atlas Ins. Co.* 14 Pick. 141; *Waters* v. *Lilley*, 4 Pick. 145; *Perley* v. *Langley*, 7 N. H. 233; *Randall* v. *Rotch*, 12 Pick. 107; *Bolton* v. *Colder*, 1 Watts, 360, 363; *Newbold* v. *Wright*, 4 Rawle, 195; *Bryant* v. *Comm. Ins. Co.* 6 Pick. 131, 145; *Frith* v. *Barker*, 2 Johns. 327; *Edie* v. *E. I. Co.* 1 W. Black. (Wms. ed.) 295, & 2 Bur. 1216; *Thompson* v. *Giles*, 3 Dow. & R. 733; *Same case*, 2 Barn. & Cr. 422; *Muzzy* v. *Eagle Bank*, 9 Met. 306; *Perkins* v. *Franklin Bank*, 21 Pick. 483; *Merchants Bank* v. *Woodruff*, 6 Hill, 174; *Atkins* v. *Howe*, 18 Pick. 16.

In the third place, the usage does not go far enough; it does not extend to the risk. There is no evidence of a usage, that the loss, if any occurs, shall not fall on the collecting bank, but on its employers. It is a common usage for trustees to deposit the money of their beneficiaries, mingled with their own, and in their own names; but such deposits are at the risk of the depositors; and, if the bank fails, the loss falls on them. *Massey* v. *Banner*, 1 Jac. & Walk. 241. The same rule applies to an agent. Paley on Agency, 46; *Wren* v. *Kirton*, 11 Ves. 377. And also to a receiver. *Massey* v. *Banner*, as above cited, and 4 Madd. 413. A usage, to carry freight on deck, does not go far enough to render insurers liable; it must appear further, that the freight was at their risk, either under a special contract, or from the nature of the property, or from their being accustomed to pay such losses. *Taunton Copper Co.* v. *Merch.*

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Ins. Co. 22 Pick. 108. Customs are to be sparingly admitted. *Donnell* v. *Col. Ins. Co.* 2 Sumn. 377.

S. Bartlett, for the defendants. The inquiry is, whether the mode of transmission, adopted by the defendants, has rendered them liable, as for a neglect of duty. Two questions arise, first, as to the agent employed; and, second, as to the indorsement.

1. It is argued, that the employment of the Commonwealth Bank was improper, on the ground, that the trust reposed in the defendants was a personal confidence, and, also, that a delegated authority cannot be delegated. Admitting the principles, upon which these objections are founded, they do not apply in the present case. The contract was made with a corporation, which can only act by means of its agents; and this necessarily implies a delegation of the whole authority. As to the trust reposed in the defendants, it was nothing more than that they should select a proper agent to do the business in Washington. The two grounds relied upon are founded in error so far as relates to collecting banks. *Mech. Bank* v. *Merch. Bank*, 6 Met. 13; *Fabens* v. *Mercantile Bank*, 23 Pick. 330; *Bank of Washington* v. *Triplett*, 1 Peters, 25. A collecting bank is to use reasonable diligence, that is, to act judiciously and carefully, in the appointment of an agent, and to take reasonable care that the agent does his duty. As there is no imputation of improper conduct, in either of these respects, the question is narrowed down to the simple inquiry, whether the defendants had a right to select as an agent a bank in Boston. The burden is on the plaintiffs to show, that such a selection was improper; and there is nothing in the evidence, from which such an inference can be drawn.

But, further, the conduct of the defendants was conformable to a general usage, which is shown to have existed since 1834; and this usage, the defendants were not only at liberty but were bound to pursue; otherwise, they would take upon themselves the risk of conducting the plaintiffs' business in an unusual manner. Story on Agency, §§ 77, 199.

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It is objected, that a usage, which is repugnant to established principles, cannot be sustained; but the very nature of a usage implies, to some extent, a qualification of the otherwise admitted principles of law. It is conceded, that a usage contrary to public policy cannot stand. The cases cited, in which a usage has been held bad, were probably all of them decided on the ground, that the usage set up was either repugnant to the contract of the parties, or against public policy; but it cannot be found any where laid down, that a usage is bad merely because it is contrary to established principles. The usage in question is neither repugnant to the contract between the parties, nor against public policy. Its existence for three years was as effectual to its validity, as a longer period would have been. But, in fact, it had existed between these parties, as is shown by the evidence, for ten years. Besides, the plaintiffs had actual knowledge of the usage, and never found any fault with the course pursued by the defendants.

2. Were the defendants bound to make a restricted indorsement? The plaintiffs indorsed to the defendants without restriction; and the conduct of the former is a fair measure of the duty of the latter. This practice is not without a reason. It was proper, that these seven small drafts, which had been taken separately by the plaintiffs, in the course of their business, should be left upon a general indorsement, in order that they might be consolidated if necessary; otherwise, the process of collection, if each little draft was obliged to be kept by itself, might be very expensive to the plaintiffs. That such is the necessity of the course of business is proved by the fact, that the plaintiffs themselves made a general indorsement to the defendants. But, if it were necessary to resort to it, there is evidence in the case, which shows that what took place between the parties was quite equivalent to a restricted indorsement. See the letters inserted in the report of the case of the *New England Bank* v. *Bank of the Metropolis*, 1 How. 234; the remarks of Marshall

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C. J., in 1 Peters. 31; and *Lawrence* v. *Stonington Bank*, 6 Conn. 521.

WILDE, J.* This is an action of assumpsit; but the foundation of the plaintiffs' claim is the alleged negligence of the defendants, in not collecting certain bills left with them for collection by the plaintiffs.

The defendants proved that they placed these bills in the hands of the Commonwealth Bank for collection, the same being payable in the city of Washington, where the defendants had no correspondents. This, the plaintiffs' counsel contend, the defendants had no right to do, on the ground, that an agent has no right to delegate his authority to a sub-agent, without the assent of his principal. This, no doubt, is generally true; but when, from the nature of the agency, a sub-agent or sub-agents must necessarily be employed, the assent of the principal is implied. Such was the nature of the agency in the present case. It could not have been expected, that the defendants would employ one of their own officers to proceed to Washington to obtain payment of the bills. The bills undoubtedly were intended to be transmitted to Washington for collection, and if the defendants employed suitable sub-agents for that purpose, in good faith, they are not liable for the neglect or default of the sub-agents. This was so decided in *Fabens* v. *Mercantile Bank*, 23 Pick. 330. The chief justice, in delivering the opinion of the court, says, "It is well settled, that when a note is deposited with a bank for collection, which is payable at another place, the whole duty of the bank so receiving the note, in the first instance, is seasonably to transmit the same to a suitable bank or other agent at the place of payment. And as a part of the same doctrine, it is well settled, that if the acceptor of a bill or promisor of a note has his residence in another place, it shall be presumed to have been intended and understood between the depositor for collection and the bank, that it was to be transmitted to the place of the resi-

* The chief justice did not sit in this case.

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dence of the promisor." This decision of the court on both points is, we think, well founded in principle, and supported by a decided weight of authority. The only opposing decision is in the case of *Allen* v. *Merchants Bank*, which was first reported in 15 Wend. 482, and which was afterwards removed to the court of errors, where the judgment of the court below was reversed by a majority of the court of errors. This reversal is opposed to a number of decisions of great authority, and is not, as we think, well founded in principle. If the bank in that case acted in good faith, in selecting a suitable sub-agent, where the bills were payable, there seems to be no principle of justice, or public policy, by which the bank should be made liable for the neglect or misfeasance of the sub-agent. And it is admitted, by Mr. Senator Verplanck, who states the grounds of the reversal of the judgment, that the bank would not have been liable, if there had been an understanding or agreement, express or implied, that the bills were to be transmitted to another bank for collection. Now, we think, in that case, as in this, there was manifestly such an understanding. There is another view of that case, taken by the learned senator, in which we cannot concur. He makes no distinction between the neglect of the officers of the bank where the bills were deposited, and that of the bank to which they were transmitted for collection. We think the distinction is obvious. We agree, however, with the learned senator, that the decisive question in such cases is, what was the understanding of the parties, as to the duties the collecting bank undertook to perform. And as to this, we have no doubt of the understanding of the parties in the present case. That was, we think, that the defendants were to transmit the bills, or to cause them to be transmitted, to some suitable bank or other agent in Washington, for collection; and the questions are, whether, in employing the Commonwealth Bank to transmit the bills, the defendants acted in good faith; and if so, whether they are responsible for the failure of that bank. That the defendants acted in good faith we cannot doubt. The Commonwealth Bank, at the time, was in perfectly good

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credit, and had great facilities for obtaining payment of bills and notes payable in distant states. The defendants were the plaintiffs' general agents, and they had no instructions; they were, therefore, to exercise their best judgment as to the transmission of the bills, and the remittance of the money when collected. And we see no cause to doubt that they acted in good faith, and exercised a sound judgment. It was objected that the defendants ought to have made restricted indorsements; but it is a satisfactory answer, that the defendants made their indorsements in the same manner the plaintiffs did. Considering, then, that the defendants acted in good faith, and exercised a sound judgment in employing the Commonwealth Bank, we think there is no principle of law or equity which can subject them to any liability, by reason of the subsequent failure of that bank.

In our opinion, the defendants' responsibility was limited to good faith and due discretion in the choice of an agent to transmit the bills, and to procure a remittance of the money when paid. This case is not distinguishable from the case of *Fabens* v. *Mercantile Bank*, and the cases there cited.

We do not think that the proof of any usage is necessary to support these decisions; but in the present case, the usage is well proved to have been uniform, in similar cases, ever since the year 1833 or 1834, three or four years before these bills were deposited in the defendant bank.

It was also proved that one bill had been transmitted in like manner, by the defendants, for the plaintiffs, and returned to them with protest, and without objection by them. This was in 1836, more than a year before the bills in this case were deposited. This would be sufficient notice of the usage or manner in which the defendant transacted such business, if any such notice were required. It seems, however, that the usage of a bank is binding on all persons dealing with the bank, whether they know of the usage or not. *Lincoln and Kennebeck Bank* v. *Page*, 9 Mass. 155; *Bank of Washington* v. *Triplett*, 1 Pet. 25. That is a point, however, not necessary to be decided in this case.

Plaintiffs nonsuit.

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COMMONWEALTH *vs.* WILLIAM P. EASTMAN and others.

It is in the discretion of the court, in which an indictment is pending, to quash it, or to leave the defendant to a motion in arrest of judgment, and the refusal to quash an indictment is not a proper subject of exception.

An indictment ought not to be quashed, in a doubtful case, but only when it is clearly insufficient to sustain a judgment against the defendant.

In order that the papers and letters of an insolvent debtor, produced by his assignee, may be competent evidence as coming from the possession of the insolvent, it must be shown that the assignee received them from the messenger, and that the latter took possession of them under his warrant, as papers relating to the estate of the insolvent

Letters addressed to a party, and found in his possession, are not evidence against him of the matters therein stated, unless the contents have been adopted or sanctioned by some reply, or statement, or act done, on his part, and shown by other proof.

Where one of two persons, who had examined and appraised the assets of an insolvent debtor, was called as a witness to the value thereof, and produced a paper signed by himself and his associate, containing the results of their appraisal; it was held, that such paper could not be read to the jury, as the joint certificate of the witness and his associate, without first calling the latter to testify to its accuracy.

An indictment for a conspiracy alleged, in the first count, that the defendants conspired together to cheat and defraud P. S. S. of his goods; in the second, that they conspired to get the goods of P. S. S. into their possession, under color and pretence of buying the same; and, in the third, that they conspired to get possession of the goods of P. S. S., upon trust and credit, and then to remove the same out of the commonwealth: On the trial of this indictment, evidence having been given of a purchase of goods by the defendants of P. S. S., ostensibly for cash, but, in fact, on the short credit resulting from the indulgence usually allowed on cash sales: — it was held, that the prosecuting officer might inquire of a witness, whether, at the time of the sale, the standing and credit of the defendants were such, that they could have bought goods on credit; — also, that other purchases of goods, made by the defendants of other persons, at about the same time, and under the same circumstances, with the purchase of P. S. S., were admissible in evidence, to show the nature and extent of the defendants' business, and to prove the criminal intent alleged in the indictment; — also, that evidence of the defendants' having obtained bills of lading, about the same time, and forwarded them to their correspondents in other places, accompanied by drafts thereon, before the goods described in such bills of lading had been in fact purchased, was admissible to prove the criminal intent.

It is competent for a party, after having closed his case, so far as relates to the evidence, to introduce additional evidence, by the cross examination of the witnesses on the other side, for the purpose of more fully proving his case.

Where handwriting is to be proved by comparison, the standard used for the purpose must be a genuine and original writing, and must first be established by clear and undoubted proof: Impressions of writings, taken by means of a press, and duplicates made by a copying machine, are not originals, and cannot be used as standards of comparison.

Where several persons are jointly indicted and on trial, the submitting of the case of one of them to the jury, by itself, in the course of the trial, at the instance of the other defendants, in order that such defendant, if acquitted, may be called as a witness by them, is a matter peculiarly within the discretion of the presiding

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judge, and depending upon his view of the evidence; to be allowed, where there is no evidence against the party, and to be refused where there is such evidence, although, in the opinion of the judge, it may be altogether insufficient for a conviction.

The obtaining of goods on credit, by an insolvent person, without disclosing his insolvency, and without having any reasonable expectation of being able to pay for such goods, in and by means of the fair and ordinary course of his business, is not of itself such an unlawful act, as may be the subject of a conspiracy; though, it would be otherwise, it seems, in the case of a purchase made without any expectation of payment.

The obtaining possession of goods, under the pretence of paying cash for them, on delivery, the buyer knowing that he has no funds to pay with, and appropriating the goods to his own use, in fraud of the seller, is such a fraud or cheat, as may be the subject of a conspiracy.

In an indictment for a conspiracy to do an act, which is a well known and recognized offence at common law, the object of the conspiracy may be described by the general terms, by which it is familiarly known; if the alleged purpose be the doing of an act, which is not unlawful in itself, but which is to be effected by the use of unlawful means, those means must be particularly set forth; if it be the doing of an act, which is not an offence at common law, but only by statute, the purpose of the conspiracy must be set forth in such a manner as to show that it is within the terms of the statute.

When a conspiracy is plainly and technically alleged, the acts done in pursuance of it need not be set out; or, if set out, they need not be proved.

It is not a sufficient statement of the offence, in an indictment for a conspiracy to cheat, to allege that the defendants conspired together to cheat and defraud P. S. S. of his goods; or to acquire and get into their possession the goods of P. S. S., under color and pretence of buying the same; or to get possession of the goods of P. S. S. upon trust and credit, and then to remove and transport them out of the commonwealth.

The words "cheat and defraud" do not necessarily import any offence, either by statute, or at common law; and, therefore, an indictment for a conspiracy, in which the object is alleged to be to "cheat and defraud," must set forth in detail such further allegations, as will show the object to be an offence, either by statute, or at common law.

The defendants, William P. Eastman, Arthur M. Eastman, and Townsend Fondey, were indicted in the municipal court of the city of Boston, at the April term, 1844, on fifteen charges of conspiracy to cheat and defraud as many different individuals and firms named in the indictment. The several charges were set forth in the same manner, each being the subject of three counts, the first, second, and third of which, in each case, were in the same form, substantially, with the corresponding counts in every other. The contents of the indictment will sufficiently appear from a statement of the first three counts, in which the defendants are charged with one of the fifteen alleged conspiracies.

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The first count alleged, that the defendants, "being evil disposed persons, and devising and intending one Philo S. Shelton, &c., to injure and defraud, on the twenty-sixth day of March, in the year eighteen hundred and forty-four, at, &c., did unlawfully conspire, combine, confederate, and agree together, the said Shelton to injure, cheat, and defraud of his moneys, goods and chattels, against the peace," &c.

The second count alleged, that the defendants, on, &c., at, &c., "did falsely conspire, combine, confederate, and agree among themselves, unlawfully and fraudulently to acquire and get into their hands and possession the goods, wares, and merchandise of one Philo S. Shelton, &c., under color and pretence of buying the same of and from the said Shelton, and that, in pursuance of, and according to the conspiracy, combination, confederacy, and agreement aforesaid, they the said defendants then and there falsely, unlawfully, and deceitfully did obtain and acquire of the said Shelton, one hundred and ten bags of coffee, being the proper goods and merchandise of him the said Shelton, of the value of thirteen hundred and twenty-eight dollars, under pretence of buying the same, and did then and there, in pursuance of the conspiracy, combination and agreement aforesaid, cheat and defraud him thereof; against the peace," &c.

The third count alleged, that the defendants, "wickedly and unjustly devising and intending one Philo S. Shelton, &c., to defraud and cheat of his goods, property, and merchandise, on, &c., at, &c., did falsely and fraudulently conspire, combine, confederate, and agree together among themselves, to obtain and get into their hands and possession, of and from the said Philo S. Shelton, his goods, property, and merchandise, upon trust and credit, and then to remove, transport and send the same out of the said commonwealth, and defraud him thereof; and that the said defendants, in pursuance of, and according to the conspiracy, combination, confederacy, and agreement aforesaid, so as aforesaid had, did then and there falsely and fraudulently obtain and get into their hands and possession, of and from the said Shelton, one

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hundred and ten bags of coffee, of his proper goods, wares, and merchandise, altogether of the value of thirteen hundred and twenty-eight dollars, upon trust and credit; and in further pursuance of the conspiracy, combination, and confederacy aforesaid, so as aforesaid had among themselves, they the said defendants, before the time of payment for the said goods, property, and merchandise had arrived, did then and there make certain preparations, and did then and there attempt, and did then and there do certain overt acts to remove, transport and send the same out of the said commonwealth, and did then and there, in manner aforesaid, cheat and defraud the said Shelton of his goods, property, and merchandise aforesaid; against the peace," &c.

The third count, in some of the charges, varied from the preceding, in alleging that the defendants instead of attempting to remove, &c., did actually remove and transport, the goods mentioned therein out of the commonwealth.

At the succeeding May term, the defendants moved that the indictment be quashed, on the ground, that no offence was set forth therein. This motion was argued before *Allen*, J., by whom the cause was continued for advisement, until the July term, when the opinion of the court was stated by *Ward*, J., disallowing the motion. It being intimated however, at the same time, that the court would accede to any arrangement or disposition of the case, by which the questions of law arising on the indictment might be first argued in this court, the defendants demurred to the indictment; and the demurrer being overruled, the defendants thereupon alleged exceptions to the order of the municipal court overruling the same, and thus brought the case before this court.

At the March term of this court, 1845, upon the cause being opened, the court declined hearing the demurrer argued, unless upon the understanding, that the judgment upon it, if in favor of the commonwealth, should be final. The defendants thereupon withdrew their exceptions, and the case was remanded to the municipal court for further proceedings.

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In the municipal court, the defendants renewed their motion to quash the indictment; and the case being continued for a hearing thereon, before the judges of the court of common pleas, at their semiannual meeting in July, the motion was then partially argued, by *R. Choate & G. Bemis*, for the defendants, and by *S. D. Parker*, for the commonwealth; but the judges declining to interfere in the summary manner proposed, (unless the defendants would agree to abide by the decision, if against them, which they declined doing) the motion was refused and the case was directed to be tried, and was accordingly tried, in the municipal court, before *Cushing*, J., at the September term, 1845.*

After the empanelling of the jury, and before the commencement of the trial, the defendants renewed their motion to quash the indictment, and objected to the admission of any evidence in support of it; but the motion and objection were overruled, and the trial proceeded. The defendants were convicted of all the charges in the indictment except one in reference to which no evidence was given; and they thereupon alleged exceptions to the order above mentioned overruling the motion to quash, and to other orders, rulings, and instructions of the judge, before whom the trial took place.

The following outline of the principal facts, as they are stated in the bill of exceptions, will be sufficient to explain

* It may be useful to state, for the information of those, who are not conversant with the system of criminal procedure, which is in use in this commonwealth, that the right to take exceptions to the orders, rulings, and instructions of the judge, before whom an indictment is tried, is confined to the defendant, and is denied altogether to the commonwealth. The judges of the court of common pleas, therefore, who are *ex officiis* judges of the municipal court of the city of Boston, and who have original and exclusive jurisdiction of all indictments (except those for capital crimes), consider it to be their duty, in all cases, where the law is doubtful, but important to be settled, to rule against the defendant, in order that the case may be brought to this court, and the law arising therein authoritatively determined. These were in substance the reasons given by the court of common pleas, for refusing fully to hear the parties on the motion for quashing the indictment, in this case, and directing it to be tried in the ordinary manner.

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the points of law, presented thereby for the consideration of the court.

The three defendants, at the time of the transactions which were the subjects of the several charges in the indictment, had for two or three months been partners in trade in the city of Boston, under the firm and style of Eastman, Fondey and company. Two of the partners had previously been connected in business with another person, under the firm and style of Eastman, Fondey and Hollister, which partnership had been dissolved, and to the business of which the first named firm had succeeded.

The defendants voluntarily became insolvent on the 29th of March, 1844.

For the three or four weeks preceding their insolvency, they had made somewhat extensive purchases of goods, ostensibly for cash, though really on the short but indefinite term of credit, usually accorded at the pleasure of the sellers on sales for cash, and sometimes extending to a period of several days, or a week, or even longer.

The goods, which were the subjects of many of these purchases, were immediately shipped for New York, Baltimore, and other places. The sellers had never received payment, though the sales were made for cash; but, in some instances, they had obtained possession of the goods sold, by the institution of replevin suits, which were still pending.

Fifteen transactions of this description were the foundation of the present indictment; and the general ground upon which the prosecution rested was, that, from the circumstances attending and shortly preceding these purchases, it was manifest, that they were not made in the fair course of business, but were effected for the purpose of defrauding the sellers of their goods, and in pursuance of a previous conspiracy to cheat and defraud.

The purchases in question appeared to have been made in the usual manner of sales for cash, at fair prices, and unaccompanied by any circumstances calculated to induce suspicion, on the part of the sellers. But, in order to show that

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they were effected in pursuance of a conspiracy to cheat, a vast amount of evidence, derived from a great variety of sources, was introduced.

The questions presented by the bill of exceptions, which arose principally upon the admission of evidence at the trial, against the objections of the defendants, are therein set forth as follows:

First. Certain letters, in the custody of the defendants' assignee in insolvency and produced by him, purporting to be addressed to the defendants by various correspondents, were offered in evidence, without any previous proof of the genuineness of the handwriting of the supposed writers.

It appeared from the testimony of the messenger in insolvency, that, on the day after the defendants applied for the benefit of the insolvent act, the messenger, accompanied by some of the creditors of the defendants, went to the store occupied by the latter, the key of which had been previously delivered to him by the defendants, and broke open one of their desks, having no key for unlocking it, and took therefrom certain papers which were delivered by him to the assignee; but the witness could not identify any of the papers produced by the assignee, as those which had been taken possession of by him as messenger.

The letters were objected to as incompetent and irrelevant, and also because they were not accompanied by proof of the handwriting of the persons, by whom they purported to be signed. The attorney for the commonwealth contended, that they were admissible as evidence of parts of transactions between the defendants and the persons whose names they purported to bear, and as evidence to be considered in connection with the answers, or other parts of the correspondence, which he said he should subsequently offer, that certain things were stated to the defendants, and done by them. The letters were then admitted and read to the jury.

Subsequently, certain letters, or what purported to be letter press copies of letters, addressed by the defendants to their correspondents, (the same being also produced from the cus-

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tody of the assignee) were read by the attorney for the commonwealth, in connection with the letters above mentioned, without objection.

Second. A schedule of the assets, furnished by the defendants to their assignees, was put by the attorney for the commonwealth into the hands of a witness called by him, and the witness was then inquired of, whether any of the assets mentioned in the schedule were of any value, and, if so, which of them, and what was their value. This question was objected to, but admitted; and the witness then produced and read in answer a paper, which was also objected to but admitted. The paper purported to be a schedule of the assets of the defendants, both as a partnership and as individuals, with a certificate attached, signed by the witness and another person, stating that they had examined the assets of the defendants, and, as far as they could form an opinion, had annexed a schedule of such amounts as might be considered good and collectible.

Third. A witness, called by the attorney for the commonwealth, was asked by him, whether the credit and standing of the defendants were such, that they could have bought goods on credit, at the time they purchased of the witness. This question was objected to, but permitted to be asked.

Fourth. Ten witnesses were called by the attorney for the commonwealth, to prove separate and distinct sales by each of them to the defendants, in the month of March, 1844, (at or about the time of the transactions which were the subject of the indictment) of the same description of goods, and under the same circumstances, substantially, as those charged in the indictment. Each of these sales was a separate and distinct transaction. For two of these sales indictments had been found, and were still pending, against one of the defendants. This evidence was objected to, except so far as it went to prove the whole amount of the defendants' purchases at the period in question. But it was admitted as evidence of the intent alleged in the indictment

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Fifth. Evidence was offered, on the part of the prosecution, to show that the defendants, in some instances, during the month of February, 1844, procured bills of lading to be made out, which they forwarded to their correspondents in New York, accompanied by drafts for the whole or a part of the amount thereof, a few days before the goods described in such bills of lading were in fact purchased. This evidence was objected to, but admitted.

Sixth. The attorney for the commonwealth, after the case had been closed for the prosecution, in order to show the participation of the defendant, Fondey, in the transactions which were the subject of the indictment, proposed to cross examine the defendants' witnesses, for the purpose of proving Fondey's signatures to some of the letters, signed in the name of the firm, which had been read by the attorney in evidence for the prosecution, without the tender of any such proof, although he had proved some specimens of Fondey's handwriting, with a view to a comparison of the same. This evidence was objected to, but admitted.

Seventh. The copies of letters, in the letter-book of the defendants, which was produced with the other books and papers by their assignee, appeared (upon inspection merely without other evidence) to be either impressions from the letters themselves, taken at the time they were written by means of a press, or to have been written by the same hand by which, and at the same time when, the originals were written, by means of a machine. And, for the purpose of enabling the jury, by a comparison of hands, to determine whether a particular paper produced was in Fondey's handwriting, the attorney for the commonwealth proposed to ask a witness who had seen Fondey write, whether a letter in the letter-book was in his handwriting. This question was objected to, but admitted.

Eighth. When the case had been closed on the part of the prosecution, the defendants' counsel moved the court, that the case of Townsend Fondey should be first put to the jury, with instructions that there was no evidence against

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him, and no evidence to warrant his conviction; and, generally, that the court should give such a direction to his case, that he might become a witness for the other defendants. This motion was overruled.

The evidence, so far as this defendant was concerned, went to show that he took no part in making the purchases charged as the subjects of the several conspiracies set forth in the indictment; but that he confined himself to the in-door business of the firm, to keeping their books of account, and to conducting their correspondence. Some of the letters, relating to consignments of goods under the circumstances indicated in the fifth exception, namely, where bills of lading were sent forward before the goods described therein had been purchased, (such letters purporting to be invoices of the goods with directions for their sale) were admitted to be in the handwriting of this defendant. But there was no other proof, that he had any knowledge, at the time of making such invoices, that the goods were not then purchased, than the circumstance of his having written such letters; nor was he in any way connected by proof with the bills of lading, or with the drafts so drawn and sent forward.

There was no evidence that Fondey had any knowledge of the intentions of his partners, to make purchases of the persons named in the indictment, or of any intention whatsoever of theirs, not to pay for what they should so buy, or of any thing that passed between them and the sellers, at the time of the several purchases.

Ninth. The attorney for the commonwealth, in closing the case for the prosecution, did not contend, that the defendants had made any false representations, or practised any artifices or deceptive contrivances, for the purpose of inducing the several sellers to part with their goods, or that the defendants had obtained the goods by means of any such pretences, artifices, or contrivances. But the general ground, on which he placed the case, was, that the defendants continued to purchase after they knew they had become insol-

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vent, without disclosing the fact of their insolvency to the sellers, and without any reasonable expectation of being able to pay for the goods in the regular and ordinary course of their business. It was not suggested, that the defendants had withheld any property from their assignees, or that they had made any fraudulent assignments or conveyances.

The defendants contended, that, in order to constitute the offence of conspiracy, there must be a combination or agreement to do something criminal in itself, or unlawful as against positive law, or to use means of accomplishment, against which common prudence could not guard; that, to make out the offence of a conspiracy to cheat, such as is charged in this indictment, there must be evidence of an unlawful combination or agreement to cheat, by means of some false pretences, which, in themselves, would be the subject of indictment, or by the use of some fraud or deceit, which would affect the public, or by some fraudulent and deceitful means, against which common prudence could not guard; that, in the absence of proof of false pretences, or facts of intentional deception, at the time of the purchases by the defendants, the indictment could not be sustained, unless the jury should be satisfied, that the defendants obtained the goods with an intention not to pay for them; and that such intention was not inferrible from the mere fact that the defendants were deeply insolvent, at the time when the several purchases were made.

The presiding judge, in his charge to the jury, after a general explanation of the law relative to the offence of conspiracy, stated to them, that, upon the evidence in the case, there were three general inquiries, which it was their duty to make, and upon each of which they must be satisfied affirmatively, in order to a conviction of the defendants, namely: *first*, whether the purchases of goods by the defendants were unlawful acts which might be the subject of a conspiracy; *second*, whether they were made in pursuance of a previous agreement, confederacy, or combination; and, *third*, whether they were made with an intent to cheat and defraud. The

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jury were then instructed specifically as to each of the inquiries thus designated.

The defendants excepted generally to the entire instructions; but as certain portions only were controverted in the argument, or considered by the court, those alone are material to be stated.

In reference to the first inquiry, the jury were instructed, "that if they should be of opinion, upon the evidence, that the defendants made any of the purchases of goods mentioned in the indictment, at a time when they had full knowledge of their insolvency, without any reasonable expectation of being able to pay for such goods in and by means of the fair and ordinary course of their business, and without making known their situation to the sellers, every such purchase was a wrongful act, which might be the subject of a conspiracy."

In reference to the third inquiry, the jury were instructed, in general, "to consider every fact and circumstance which had been given in evidence, indicative of actual intention, and tending to throw any light on the question of the intent of the parties; and that though the conduct of the defendants, if, at the time of effecting the several purchases, they resorted to the use of any artifice, trick, deception, or misrepresentation, with a view to influence the sellers, would be so entirely inconsistent with good faith, as to render it difficult to admit any such hypothesis; yet, if the purchases in question were not effected or accompanied by any such positive deception as above mentioned, but were only attended by a silent concealment of facts and circumstances, in reference to which no inquiries were made, it would be the duty of the jury to take into consideration, with a view to determine upon the intention, every fact and every circumstance, indicative of an honest intention, or of a reasonable expectation, on the part of the defendants, to pay the debts thus contracted."

It being intimated by the court, that the preliminary question presented by the bill of exceptions, namely, as o the

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sufficiency of the indictment, could not regularly be entertained in the form of an exception to the refusal of the municipal court to quash it, but that the question would more properly arise on a motion in arrest of judgment, the defendants thereupon filed such a motion, averring the insufficiency of the indictment in general terms.*

G. Bemis, for the defendants.

I. *As to the motion in arrest of judgment.*

The second form of count, which is the only one containing any statement of means, alleges that the defendants conspired to get possession of the goods of the prosecutor, under "color and pretence of buying the same." But this allegation does not charge any unlawful act, and, therefore, if the conspiracy is not otherwise sufficiently set out, the defect cannot be cured by the averment that it has been carried into execution. *Comm'th* v. *Hunt*, 4 Met. 111. In the second and third forms, in which the execution of the conspiracy is stated, the conspiracy is merged in the completed offence. *Comm'th* v. *Kingsbury*, 5 Mass. 106; *Lambert* v. *The People*, 9 Cow. 578. And these counts are insufficient as charges of cheating. 3 Chit. C. L. 999; *Comm'th* v. *Warren*, 6 Mass. 72; *Lambert* v. *The People*, before cited.

The validity of the indictment must consequently depend upon the sufficiency of the first form, in which the defendants are charged with a conspiracy to cheat and defraud a person named therein of his moneys, goods, and chattels. It is contended, on behalf of the defendants, that this form is insufficient, because it does not set out any object criminal in itself, or illegal as being against positive law, or a fraud affecting the public, against which common prudence could not guard.

1. This form of indictment is insufficient on the weight of authority. In this commonwealth, it does not appear, that the precise form here used has ever been judicially passed

* See *Comm'th* v. *Peck*, 1 Met. 448; *State* v. *Burlingame*, 15 Maine, 104; *Rex* v. *Pollman*, 2 Camp. 230.

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upon; but the law as settled in *Comm'th* v. *Hunt*, 4 Met. 111, and the reasoning of the court with reference to the third count in that case, go far towards establishing the doctrine contended for. In England, also, the law upon this point is not settled. It is possible, that the form in question might be considered as sufficient in the queen's bench, under the recent decision of *The Queen* v. *Kenrick*, 5 Ad. & El. (N. S.) 49; though the law of that case, except as to the form of the indictment, is decisive of the present for the defendants. The case of *The Queen* v. *Kenrick* may perhaps be considered as affirming that of *The King* v. *Gill*, 2 Barn. & Ald. 204; but both these cases are distinguishable from the present, inasmuch as they contained a charge of conspiracy to cheat by false pretences, *eo nomine*. See *Comm'th* v. *Hunt*, 4 Met. 126. It may well be doubted, however, whether the case of *The Queen* v. *Kenrick* will ultimately be sustained. The more recent decision of *The Queen* v. *King*, 7 Ad. & El. (N. S.) 782, in the exchequer chamber, throws a shade over it; and prior to the case of *The Queen* v. *Kenrick*, the current of authorities was the other way. *The King* v. *Biers*, 1 Ad. & El. 327; *The Queen* v. *Peck*, 9 Ad. & El. 686; *Rex* v. *Fowle*, 4 Car. & P. 592; *Rex* v. *Richardson*, 1 M. & Rob. 402; *The King* v. *Turner*, 13 East, 228; *Rex* v. *Pywell*, 1 Stark. R. 402; *The Queen* v. *Parker*, 3 Ad. & El. (N. S.) 292, and Mr. Greaves's note thereon, in 2 Russ. on C. 695, note (n); 2 Russ. on C. (5 Am. ed.) 690; 1 Stark. C. P. (1st ed.) 144, 145, 147.

In other states, the weight of authority is against the sufficiency of the indictment. The cases of *Lambert* v. *The People*, 9 Cow. 578, in New York, *State* v. *Rickey*, 4 Hals. 293, in New Jersey, and *Hartmann* v. *Comm'th*, 5 Barr, 60, in Pennsylvania, all leading cases, and the last mentioned a very recent one, are strong authorities for the defendants on this point. In New York, the case of *Lambert* v. *The People* was followed by a statute, establishing the principle now contended for; and similar legislation has also taken place

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in Alabama, Missouri, and Arkansas. In the case of *State* v. *Buchanan*, 5 Har. & John. 317, a leading case in Maryland, which may be cited for the prosecution, as to the law of conspiracy, rather than for the form of the indictment, the indictment either sets out the means, by which the conspiracy was to be effected, or alleges the offence of embezzlement as its object.

2. This form of indictment does not set out the offence charged with sufficient certainty and precision, and is therefore defective on principle. The whole charge is contained in the words "conspire to cheat and defraud one P. S. S. of his goods." If so brief a statement of an offence be sufficient, it must be in consequence of the technical and well settled import of the terms used.

The word *conspire* is not technical, like the word *murdered* or *ravished*, but signifies nothing more than that the defendants *together* did or *agreed to do* the act imputed to them. 1 Deac. C. L. 279; 3 Chit. C. L. 1143.

The use of the word *defrauding*, in actions of trover and bills in equity, shows that its signification is not exclusively criminal. See *Adams* v. *Paige*, 7 Pick. 542. In many cases, it is only equivalent to *depriving*. See *State* v. *Rickey*, 4 Hals. 293; *Rex* v. *Richardson*, 1 M. & Rob. 402; *The Queen* v. *Peck*, 9 Ad. & El. 686. In *Comm'th* v. *Hunt*, 4 Met. 111, the indictment might as properly have charged the defendants with conspiring to *defraud* the prosecutor of his profits, as to *diminish* them.

Nor has the word *cheat* any definitely settled signification. In the law of slander, next to the criminal law, the sense of words is most carefully canvassed. 1 Stark. on S. (Wend. ed.) 69. But it is not actionable to accuse one of *cheating*. *Savile* v. *Jardine*, 2 H. Black. 531; *Stevenson* v. *Hayden*, 2 Mass. 506; *Chase* v. *Whitlock*, 3 Hill, 139.

So, in the criminal law, there are many *cheats* which are not punishable, but only the groundwork of a civil liability. 1 Russ. on C. (5th Am. ed.) 280, 282, 285; *Comm'th* v. *Hearsey*, 1 Mass. 137; *Comm'th* v. *Call*, 21 Pick. 515, 520;

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Comm'th v. *Warren*, 6 Mass. 72; *Comm'th* v. *Drew*, 19 Pick. 179, 185; *Comm'th* v. *Manley*, 12 Pick. 173; *Adams* v. *Paige*, 7 Pick. 542; *Richards* v. *Farnham*, 13 Pick. 451.

It being thus manifest, that to cheat and defraud one of his property does not necessarily import a criminal offence; — are those terms adequate to describe an offence "fully and plainly, substantially and formally," as required by the bill of rights? This provision is held not to change the rules of the common law. *Comm'th* v. *Davis*, 11 Pick. 432; *Comm'th* v. *Phillips*, 16 Pick. 211. But it is a most important declaration of the qualities, which the common law requires in an indictment. See *Rex* v. *Horne*, Cowp. 672, 682.

When, then, an indictment charges a conspiracy to cheat the prosecutor of his goods, what are the defendants to understand is the nature of the accusation against them? It may import, that they undertook to cheat, by agreeing to buy without intending to pay any part of the price; or by agreeing to buy, and then to become insolvent, and pay merely a dividend; or by agreeing to get possession of the goods, and then maliciously to destroy them; or by agreeing to get possession of them for some lawful purpose, as, for instance, as common carriers, and then to refuse to redeliver them. Which, of all these and a variety of other supposable charges, are the defendants to be prepared to meet? Which, of all the varied forms of cheating, from merely diminishing one's profits up to the most culpable knavery, can they be reasonably sure is the accusation intended by the indictment? If, instead of an indictment, the charge were made the subject of a civil action, would not much greater particularity be required? It is true, that the action for a conspiracy supposes an actual loss or injury to have taken place; but would a declaration be sufficient, which merely set forth the agreement to injure, and the actual injury, without stating the manner in which the injury was to be and was in fact effected?

If it be said, that the criminal offence of conspiracy con-

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sists in the agreement, then, the agreement must be known to the prosecutor; and, if known, why should it not be set out with the same particularity as in a civil action? If what was agreed to be done has been done, as in the present case, there can be no pretence of an inability to set out the agreement fully. See Mr. Greaves's remarks in note (*n*) 2 Russ. on C. 694, and *The King* v. *Nield*, 6 East, 417.

There are cases, in which, if a part only of the agreement be set out, a presumption of a criminal conspiracy will arise; but, if the whole be stated, such presumption will be removed. The cases, before cited, of *The Queen* v. *Peck*, *Rex* v. *Richardson*, and *Comm'th* v. *Manley*, are of this description. Thus, in the case of *Rex* v. *Richardson*, in which the charge was of a conspiracy to defraud the prosecutor "of the fruits of a verdict," it was held, that the latter words did away the presumption of crime, which might otherwise have arisen from the general statement of a conspiracy to defraud. In such cases, is it not a *suppressio veri*, on the part of the prosecutor, (who, of course, knows the whole agreement, and that if set out it would constitute no offence), to state only so much of it as will raise a presumption of crime? If, in the present case, the conspiracy were to cheat and defraud P. S. S., by getting possession of his goods, "without paying for them," ought not the indictment, in fairness, to have contained the latter words, which would have shown that no offence had been committed? It cannot be the theory of the law, nor is it consistent with the bill of rights, thus to expose a citizen to trial, as for a crime, on a charge, which, if fully stated, would not constitute an offence.

Admitting the offence to consist in the *intent*, or rather in the *agreement*, to do an unlawful act, there is no offence, to which, on principle, the constitutional provision above mentioned should be more strictly applied; for this, it is believed, is the only offence known in our law, which does not require for its consummation, the doing of some overt act. Even in the case of attempts made punishable by our statute (Rev. Sts.

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c. 133, § 12,) as well as attempts at common law (*Reg.* v. *Meredith*, 8 Carr. & P. 589,) there must be some act done *towards* the commission of the offence attempted.

On these grounds, it is contended, that this form of indictment, — so far as an indictment ought to inform the defendants therein of the nature of the charge against them, — is defective, and ought not to be sustained; but, if the form be correct, the facts do not show that the offence of conspiracy has been committed; inasmuch, as false pretences, or some other technical offence of cheating, must be proved, even if not necessary to be averred. *The Queen* v. *Kenrick*, 5 Ad. & El. (N. S.) 49; *Rex* v. *Hamilton*, 7 Carr. & P. 448.

II. *As to the exceptions.*

1. The letters which were read in evidence, purporting to be addressed to the defendants by their correspondents, were improperly admitted for two reasons: first, they were not identified by the messenger as among the papers of the defendants of which he obtained possession, nor were they otherwise connected with the defendants (*Comm'th* v. *Kinison*, 4 Mass. 646); and, second, if they had been properly identified, they were not admissible as evidence of the facts stated in them. *Rex* v. *Plumer*, Russ. & Ry. 264. The ground, upon which the letters of correspondents, addressed to a party and found in his possession, are admitted as evidence against him, is an implied admission of, or acquiescence in, the statements they contain; but the mere possession of unanswered letters is not, of itself, such an acquiescence or admission. See *Fairlie* v. *Denton*, 3 Carr. & P. 103; Phillips on Ev. (4th Am. ed.) Cow. & H. notes, 156, 195; 1 Greenl. on Ev. § 198. Nor did they become admissible by the subsequent reading of the letters of the defendants to their correspondents; the latter not being shown to be in reply to the former, and the statements of the former not being recognized in the latter. *M'Cully* v. *Barr*, 17 S. & R. 445.

2. The evidence as to the value of the defendants' assets was incompetent, first, because it was not the best evidence,

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being the mere opinion of the witness, where positive knowledge might have been obtained either from the debtors of the estate or the assignees themselves; and, secondly, because the other party to the instrument was not called or sworn. *Rider* v. *Ocean Ins. Co.* 20 Pick. 259, 262; *Webber* v. *Eastern R. R. Co.* 2 Met. 147, 149, 150.

3. The inquiry, as to the defendants' credit and standing, was objectionable, not only as asking the opinion of the witness himself, but the opinions of others not under oath.

4. The fourth exception relates to the evidence of intent inferrible from the doing of other similar acts, or the existence of other similar transactions, contemporaneously with the acts or transactions complained of as offences. This is objectionable, in the way in which it was put to the jury, because it authorized them to infer, from the fifteen purchases collectively, what they probably could not infer in each separate instance; namely, an intent to defraud another prosecutor than the one named in the count under consideration. *Comm'th* v. *Harley*, 7 Met. 506.

5. The evidence objected to under this head, which referred to proceedings more than a month previous to the transactions complained of, was too long prior in point of time to have any bearing upon the case.

6. The sixth exception presents the question, whether a party, having closed his case, shall be permitted to supply deficiencies in his own proof, by cross examining the witnesses on the other side.

7. In order to prove the handwriting of a paper, by a comparison of it with other writings, the latter must be genuine originals; and, for this purpose, copies produced by a press, or by a machine, however exact they may be, cannot be regarded as originals. *Nodin* v. *Murray*, 3 Camp. 228. See also *Moody* v. *Rowell*, 17 Pick. 490, 495; 1 Phillips Ev. 446; 1 Greenl. Ev. § 581; Phillips on Ev. (4th Am. ed.) Cow. & H. notes, 1202.

8. The eighth exception was taken to the refusal of the municipal court to put the case of Townsend Fordey to the

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jury, upon the evidence for the prosecution. This was the right of the defendants, and not merely discretionary with the court, if, as is contended, there was no evidence against Fondey.

2. The general question, arising on the last exception, is, whether it is unlawful for an insolvent person, knowing the state of his affairs, to continue his business afterwards so far as to make purchases of goods on credit. It is contended, first, that there is nothing in the insolvent law, which makes such continuance in business criminal, or even wrongful; and, second, that it is not unlawful, much less criminal, to contract debts, without a reasonable expectation of being able to pay them, in the fair and ordinary course of business. *Jones* v. *Howland*, 8 Met. 377.

S. D. Parker, for the commonwealth.

I. *As to the exceptions.*

1. The letters of the defendants, being found by the messenger among their papers, and taken possession of by him, according to the provisions of the first and sixth sections of the insolvent act, as papers relating to their estate, came from the proper custody, and must be presumed to be genuine and authentic, in the absence of proof to the contrary; and they were proper evidence, to the extent and in the manner they were used, as stated in the bill of exceptions. *New England Mar. Ins. Co.* v. *D'Wolf*, 8 Pick. 56, 62; *The United States*, v. *Libby*, 1 Woodbury & Minot, 221, 225, 226.

2. The witness, called to testify to the value of the assets, stood in the position of an expert; and the subject, as to which he was interrogated, must, from the very nature of the case, be a matter of opinion. An appraisement is necessarily nothing but an opinion. The paper, produced by the witness, was not put in as evidence, but simply read by him as his opinion in answer to the inquiry relative to the value of the assets. If admissible as the opinion of the witness, does it become inadmissible when the witness adds, that it is also the opinion of his associate?

3. The credit and standing of the defendants were not

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mere matters of opinion, but facts within the knowledge of witnesses; and, if the defendants' standing were such that they could not have obtained goods on credit, this was a fact manifestly important and material to be shown, in reference to the character of the transactions in question. The inquiry objected to was therefore proper.

4. The authorities are abundant to show, that evidence of other acts and transactions, similar to those which are the subjects of investigation, is admissible in proof of intent or guilty knowledge. *Carey* v. *Hotailing*, 1 Hill, 311, 316, 317; *Hitchcock's case*, 6 City Hall Recorder, 43; *Gardner* v. *Preston*, 2 Day, 205; *The King* v. *Parsons*, 1 Wm. Black. (2d ed.) 392, note (*o*); *Rex* v. *Roberts*, 1 Camp. 399.

5. The evidence objected to under this head of the exceptions was clearly admissible to show the intent. *The King* v. *Ellis*, 6 Barn. & Cres. 145; *Reg.* v. *Mansfield*, Carr. & Marsh. 140; *Rex* v. *Davis*, 6 Carr. & P. 177; *The King* v. *Dunn*, Moody, 146; and cases cited as to the 4th exception.

6. The proceeding, which was the ground of the sixth exception, is every day's practice. *Rex* v. *Kroehl*, 2 Stark. R. 343.

7. The letters introduced for the purpose of comparison were not copies, but originals. *Simpson* v. *Thornton*, 2 Mood. & R. 433. When a writing is made on stone, and impressions are taken therefrom, in the process of lithography, every such impression is an original. If this objection is well founded, it applies only to the case of Fondey.

8. The motion, that Fondey's case should be separately put to the jury, on the ground, that there was no evidence affecting him, was a matter strictly within the discretion of the municipal court, and cannot therefore be made the subject of an exception.

9. [This exception was considered by the attorney for the commonwealth in connection with the motion in arrest of judgment.]

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II. *As to the motion in arrest of judgment.*

The three forms, adopted in this indictment, were taker from Davis's Precedents; the first count being a literal copy of No. 134; the second of No. 124; and the third of No 127, with this difference, that the precedent in Davis alleges that the defendants absconded, instead of alleging that they removed, or made preparations to remove, the goods out of the commonwealth.

The doctrine of merger, insisted upon by the defendants, is not applicable. A misdemeanor may merge in a felony, but not in a misdemeanor. *The People* v. *Mather*, 4 Wend. 229, 265; *State* v. *Murray*, 15 Maine, 100. In *Comm'th* v. *Kingsbury*, 5 Mass. 106, cited for the defendants, the acts, which were the subject of the alleged conspiracy, when executed, became a felony. It was also held in that case, that a conspiracy to commit a misdemeanor, and the committing of the same, might be joined in one indictment. In the present case, both the offence charged, and the subject of it, are merely misdemeanors.

As to the certainty required in indictments for conspiracy, it is laid down by Savage, C. J., in *Lambert* v. *The People*, 9 Cow. 581, "that the same certainty is not required as in other cases;" for which he refers to *Rex* v. *Rispal*, 3 Burr, 1320.

It was argued, that, in order to constitute the offence of conspiracy, the purpose or object must be something criminal in itself. But this is not the rule. There are many cases in which it would be an indictable conspiracy for two or more to agree to do an act, which one person might execute with impunity. *The King* v. *Kimberly*, 1 Levinz, 62; *The King* v. *Armstrong*, 1 Ventris, 304; *Rex* v. *Spragg*, 2 Burr, 993; *Collins* v. *Comm'th*, 3 S. & R. 220, the second count; *Comm'th* v. *Hunt*, 4 Met. 111. The true rule, to be drawn from all the cases, seems rather to be, that whatever is wrongfully injurious to the public, or to an individual, may be the subject of a conspiracy, whether it be criminally punishable or not. Rep. on the Pen. Code of Mass. Conspir-

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acy, 6, n. (*i*). A good illustration occurs in the case of *Anderson* v. *Comm'th*, 5 Randolph, 627, in which it was held, that a conspiracy to seduce a woman would be indictable, although seduction itself would not be.

The principal alluded to furnishes an answer also to the ninth head of the exceptions; for, though it may not be criminally punishable in an insolvent debtor, to make purchases of goods in the manner supposed by the instruction, to which exception was taken; yet it is impossible to deny, that such purchases would be wrongfully injurious to the sellers.

The general question on this motion is, whether all the counts in the indictment are so defective, as to require that judgment should be arrested; for, if any one of them is good, that may be the foundation of a valid judgment. The law of conspiracy was fully considered, in England, by lord Denman, in the recent case of *The King* v. *Seward*, 1 Ad. & Ell. 706, and in this commonwealth, by the present chief justice of this court, in *Comm'th* v. *Hunt*, 4 Met. 111. According to lord Denman, a conspiracy must be either for an unlawful purpose, or to effect a lawful purpose by unlawful means. The general rule, stated in the last named case, is, that in an indictment for a conspiracy to compass or promote a criminal or unlawful purpose, such purpose must be set forth fully and clearly, and the means, by which it is proposed to be accomplished, need not be stated; but, that in an indictment for a conspiracy to promote or compass a purpose not in itself criminal or unlawful, by the use of criminal or unlawful means, the means intended to be used must be set forth. Tried by the rule thus stated, all the counts in the indictment will be found sufficient, both in form and substance.

1. In the first and other corresponding counts, which allege that the defendants, with intent to injure and defraud one P. S. S., conspired together to cheat and defraud him of his goods, &c., an unlawful purpose is set out. This is indicated by the use of the words *cheat and defraud*. *Earl of Bristol*

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v. *Wilsmore*, 1 Barn. & C. 514, 521; *Rex* v. *Jackson*, 3 Camp. 370; *Scholtz's case*, 5 City Hall Recorder, 112, 114. The words *injure and defraud*, which are used to describe the intent, have a definite technical meaning, and are therefore proper to be used in an indictment, to denote the wrongful and injurious character of the acts to which they are applied. See Rev. Sts. *c.* 126, §§ 1 to 6 & 14; *c.* 127, § 32. These terms sufficiently indicating the unlawfulness of the purpose, it was not necessary to set out the means intended to be used.

This form of indictment received the sanction of this court in *Comm'th* v. *Ward*, 1 Mass. 473, which is the more in point, because the means therein stated, namely, false pretences, were not then criminal, and consequently, no criminal means were there set out. It is also supported by the following English cases and authorities: *The King* v. *Gill*, 2 Barn. & A. 204; *The Queen* v. *Parker*, 3 Ad. & Ell. (N. S.) 292, 298; *The King* v. *Parsons*, 1 Wm. Black. (2d ed.) 392; *The Queen* v. *Kenrick*, 5 Ad. & Ell. (N. S.) 49, 60; *The Queen* v. *King*, 7 Ad. & Ell. (N. S.) 782, 792; *The King* v. *Robinson*, 1 Leach, 44; *The King* v. *Airey*, 2 East, 30; 3 Chitty C. L. (4th Am. ed.) 1143 (referring to Ld. R. 1167, & 1 Salk. 174); Archbold C. P. 675; *The Queen* v. *Best*, 6 Mod. 185; 4 Steph. Comm. 266. The following American cases are to the same effect: *State* v. *Buchanan*, 5 Har. & J. 517; senator Stebbins's argument in *Lambert* v. *The People*, 9 Cow. 578; *Comm'th* v. *Collins*, 3 Serg. & R. 220, the third count; *The People* v. *Olcott*, 2 Johns. Cases, 301, & 2 Day's Cases, 507, note; *Barthelemy* v. *The People*, 2 Hill, 248; *Eason* v. *Petway*, 1 Dev. & Batt. 44, 47; *The People* v. *Mather*, 4 Wend. 264; *Scholtz's case*, 5 City Hall Recorder, 112, 114.

In the case of *State* v. *Rickey*, 4 Hals. 293, cited for the defendants, in which it was held, that it was not indictable to conspire to do an act not criminal, there was no allegation of a purpose to defraud. Of that case, the commissioners for revising the criminal law in this commonwealth remark, that

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"it seems to clash with the common law, and the general current of jurisprudence, from the case of *The King* v. *Journeymen Tailors*, 8 Mod. 10, downward." Report, Conspiracy, 2, note (*d*). The commissioners also question the correctness of lord Ellenborough's decisions in *The King* v. *Turner*, 13 East, 228, and *Rex* v. *Pywell*, 1 Stark. R. 402. See also, with reference to the authority of those cases, *Lambert* v. *The People*, 9 Cow. 584; Roscoe C. E. 372; *Comm'th* v. *Hunt*, 4 Met. 131; and *The Queen* v. *Kenrick*, 5 Ad. & Ell. (N. S.) 49.

It is said, that to cheat and defraud is not indictable, except under certain special circumstances; and, therefore, that the object of the conspiracy does not appear to be the doing of an unlawful act. The answer is, that the manner of the cheating proposed to be effected is not the test, by which to determine whether it may or may not be the subject of a conspiracy; if wrongfully injurious, it is equally criminal, as if it were indictable.

2. The second and similar counts set out both an unlawful purpose, namely, to cheat and defraud, and the unlawful means, by which it was to be effected, that is to say, the getting possession of the goods of the persons therein named, under color and pretence of buying them, or, in other words, by means of a pretended or void sale. A sale for cash is void, even though the goods are delivered, if the terms of sale are not complied with. *Leven* v. *Smith*, 1 Denio, 571.

3. The third and fourth varieties are but slightly different from the precedent, No. 127, in Davis's Precedents. In the latter, the conspirators are charged with agreeing to abscond out of the commonwealth, after getting the goods into their possession. In the present case, the charge is of a purpose to remove the goods out of the commonwealth. Both are injurious and wrongful acts, which may be the subject of a conspiracy; and these counts charge both an unlawful object, and an agreement to effect it by unlawful means.

A remark, equally applicable to all the counts, is, that this is not an indictment for cheating, or subject to the technical

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rules applicable to indictments for cheating, but only for a conspiracy to cheat, to which a very different set of rules is to be applied. The counts may all be bad as an indictment for cheating, but perfectly good as an indictment for a conspiracy to cheat.

R. Choate replied.

Dewey, J.* An exception was taken to the refusal of the municipal court to sustain a motion to quash the indictment, in this case, on the ground, that it sets forth no sufficient charge of any criminal offence. The substantial objections, which were intended to be raised by this exception, come more properly before us upon the motion in arrest of judgment, which was filed in this court at the hearing, and will therefore be considered under that branch of the case. In answer, however, to the exception to the decision of the municipal court upon this point, it is sufficient to say, that a motion to quash is addressed to the sound discretion of the court, in which an indictment is pending, and if refused, is not a proper subject of exception. Such a motion should not be allowed to prevail in a doubtful case, but only when the insufficiency of an indictment is so palpable, as clearly to satisfy the presiding judge, that a verdict thereon would not authorize a judgment against the defendant.

Waiving the further consideration, at present, of the sufficiency of the indictment, I will proceed to notice the various exceptions to the admission of evidence, and to the instructions of the presiding judge, as to the facts necessary to be established, in order to authorize a verdict against the defendants.

I. The first exception relates to the admission of certain letters, purporting to be addressed to the defendants by certain of their correspondents, without any proof being offered of the genuineness of the handwriting of those correspondents. It is left somewhat uncertain, as to the extent of the evidence on the part of the commonwealth, to show that

* *Metcalf*, J., did not sit in this case.

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these letters came from the possession of the defendants. If it be true, as seems to be stated in the bill of exceptions, that the only evidence upon this point was that of the messenger, "who could not identify any of the papers produced by the assignee as those which he had taken possession of as messenger," then clearly there was an important link wanting to complete the chain of evidence. The testimony of the assignee was requisite to establish the fact, that these letters came from the possession of the defendants. It should have been shown, by the testimony of the assignee, that the letters and papers offered in evidence were received by him from the messenger; and his testimony to such fact, together with that of the messenger, that all the papers delivered by him to the assignee were obtained from the possession of the defendants, might well authorize the jury to find, that the papers and letters produced came from the custody of the defendants; although the messenger might not be able to identify the particular papers thus offered in evidence.

The letters, however, if properly identified, would not of themselves authorize any inference against the defendants; they were only the acts and declarations of others; and, unless adopted or sanctioned by the defendants, by some reply or statement, or by some act done in pursuance of their suggestions, they ought not to prejudice the defendants. Letters addressed to an individual, and received by him, are not to have the same effect as verbal communications. Silence, in the latter case, may authorize the inference of an assent to the statement made, but not equally so in the case of a letter received but never answered, or acted upon. So far as these letters might have been shown by other proof to have been acted upon or sanctioned by the defendants, so far they would have been competent evidence.

II. The second exception relates to the admission of a certain paper, containing an estimate or appraisal of the assets of the defendants made by two persons; one of whom was called as a witness to show the value of the assets, and was allowed to read to the jury a schedule of the same, on a val-

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uation thereof, made and signed by himself and his associate. This paper was an estimate made by both the persons who acted as appraisers, by him who was not called, as well as by the witness. It was thus a valuation made by the former not under oath, and should not have been admitted and read to the jury, without first calling him to testify as to its accuracy.

III. The third exception relates to an inquiry put by the attorney for the commonwealth to a witness, called by him, as to whether the standing and credit of the defendants were such, that they could have bought goods on a credit. This question was objected to, but was permitted by the court. We think the ruling was correct, and the evidence admissible.

IV. Evidence of other purchases of goods than those charged in the indictment, made by the defendants from other persons during the month of March, 1844, under similar circumstances with the transactions charged in the indictment, was admissible for the purpose of showing the nature of the business of the defendants, and the extent of the purchases made by them, and also as bearing upon the *bona fide* character of the dealings of the defendants with the particular individuals alleged to be defrauded.

This species of evidence would not be admissible for the purpose of showing that the defendants had also committed other like offences; but simply as an indication of their intention in making the purchases set out in the indictment. It is analogous to the proof of the *scienter* in indictments for passing counterfeit money, by showing that the defendant passed other counterfeit money to other persons about the same time. Such evidence is always open to the objection, that it requires the defendant to explain other transactions than those charged in the indictment; but, when offered for the limited purpose above stated, — that of showing a criminal intent in the doing of the act charged in the indictment, — it has always been held admissible. In *Rex* v. *Roberts*, 1 Camp. 399, such evidence was admitted as competent.

V. The evidence offered for the prosecution, tending to show that the defendants, during the month of February,

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1844, in several instances, obtained bills of lading and forwarded them to their correspondents in New York and elsewhere, accompanied by drafts thereon, before the goods described in such bills of lading were actually purchased, was admissible for the reason given under the head of the fourth exception, namely, as having a bearing upon the question of the defendants' intention, in the transactions set forth in the indictment.

VI. We perceive no objection to the ruling of the court, permitting the attorney for the commonwealth, after closing the case for the prosecution, so far as the introduction of witnesses by him was proposed, to cross examine witnesses introduced by the defendants, for the purpose of proving more fully the signatures to certain papers, which had been before, as was contended, insufficiently proved. The introduction of testimony, even out of the usual order of time, must, to some extent, be discretionary with the presiding judge; and therefore, a departure from the ordinary practice, (which, however, we do not perceive in the present case,) would not furnish a ground for exception.

VII. The copies of letters, in the letter book of the defendants, were not admissible as competent standards of comparison, by which to prove the genuineness of signatures to papers produced on the part of the prosecution. Impressions of writings produced by means of a press, or duplicate copies made by a machine, are not admissible for this purpose. Nothing but original signatures can be used as standards of comparison, by which to prove other signatures to be genuine. Nor can a paper, proposed to be used as a standard, be proved to be an original, and a genuine signature, merely by the opinion of a witness that it is so; such opinion being derived solely from his general knowledge of the handwriting of the person whose signature it purported to be. The evidence, resulting from a comparison of a disputed signature with other proved signatures, is not regarded as evidence of the most satisfactory character, and by some most respectable judicial tribunals is entirely rejected. In

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this commonwealth it is competent evidence; but the handwriting used as a standard must first be established by clear and undoubted proof, that is, either by direct evidence of the signature, or by some equivalent evidence. *Moody* v. *Rowell*, 17 Pick. 490; *Richardson* v. *Newcomb*, 21 Pick. 315, 317.

VIII. The request of the defendants' counsel, that the case of Townsend Fondey should be first put to the jury, with instructions "that there was no evidence against him, and no evidence to warrant his conviction," with a view to obtain his acquittal, at such a stage in the trial of the indictment, that he might be used as a witness for the other defendants, was, in our opinion, properly refused. The submitting of the distinct case of one of several defendants to the jury, during the progress of a trial, is a discretionary power vested in the presiding judge, peculiarly within his province, and to be exercised only upon his views of the evidence. If there is any evidence against such defendant, there is no legal right in the other defendants to insist upon a finding separately as to him, with a view of using him, if acquitted, as a witness for them; although the presiding judge may strongly incline to the opinion, that the weight of evidence is altogether in his favor. In the present case, there was evidence bearing upon Townsend Fondey, and tending to connect him with the transactions of the other defendants, which well authorized the presiding judge to refuse the motion to put his case to the jury separately.

IX. The next exception, being of a much more general character, and directly affecting the question, as to what acts may be the subject of the criminal offence of conspiracy, necessarily requires a careful consideration of the great principle, upon which this and similar cases are to be tried.

It was not contended by the prosecuting officer, "that the defendants had made any false representations, or practised any artifices or deceptive contrivances, for the purpose of inducing the several sellers to part with their goods, or that they obtained the goods by means of any such pretences, artifices, or contrivances." The general ground taken for the

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prosecution was, that the alleged fraud and cheating of the individuals named in the indictment, were sufficiently established by showing, "that the defendants continued to purchase goods, after they knew they had become insolvent, without disclosing the fact of their insolvency to the sellers, and without having any reasonable expectations of being able to pay for the goods so purchased, in the regular and ordinary course of their business."

The counsel for the defendants, on the other hand, contended, that in the absence of all proof of false pretences, or of any artifices, or deceptive contrivances, the indictment could not be sustained, unless the jury should be satisfied, that the defendants obtained the goods, with an intention not to pay for them, which intention was not inferrible from the mere fact of their being deeply insolvent at the time they made the purchases.

The jury were instructed, "that if they should be of opinion, upon the evidence, that the defendants made any of the purchases of goods alluded to in the indictment, at a time when they had full knowledge of their insolvency, without any reasonable expectation of being able to pay for those goods, in and by means of the fair and ordinary course of their business, and without making known their situation to the sellers, every such purchase was a wrongful act, which might be the subject of a conspiracy."

The obtaining of goods on credit, by an insolvent person, without disclosing his insolvency, and without having any reasonable expectation of being able to pay for such goods, in the ordinary course of business, was held to be an unlawful or wrongful act, without proof of any false pretences, or any acts of intentional deception, on the part of the purchasers.

We apprehend, that this instruction was too stringent upon the character of such purchases. The provisions of the insolvent laws, in reference to a debtor, who, knowing himself to be insolvent, makes payment in money, or gives preferences by way of conveyances of his property, to particular

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creditors, do not make the acts thus prohibited crimes, or declare them to be unlawful, except as frauds upon the insolvent law itself; nor do they prescribe any other consequences of such acts, than a forfeiture of the right of the party, to a discharge as an insolvent debtor. But if acts of the description stated are unlawful, as frauds upon the insolvent law, yet purchases made, and credits obtained, by one who knows himself to be insolvent, are not within the prohibition. The duty of an insolvent person, to abstain from making purchases on credit from those who are willing to give him credit, is no statute requisition; nor is it any where enjoined by the insolvent laws. It is at most only a moral obligation. Taking the strongest ground applicable to cases of this nature, the true doctrine cannot go further than this, that such purchases become unlawful, when they are made on a credit asked by the buyer, without any expectation of ability to make the stipulated payment.

Mere inability to pay one's previous debts, — mere mercantile obligation not to continue to trade after one becomes insolvent, — the provision of the statute, that payments made by a party knowing himself to be insolvent, shall debar him from obtaining his discharge, — the further provision, that if such payment is made to a creditor having like knowledge of the insolvency, it shall be invalid, and may be recovered back by the assignee for the benefit of all the creditors; — all these considerations fail to furnish any authority for the doctrine, that a purchase on credit, made by an insolvent person under the circumstances previously stated, is an unlawful act, which, if accomplished in pursuance of a concert or combination between two or more persons, without the use of any unlawful means, would sustain an indictment for a conspiracy to cheat and defraud the seller.

The presiding judge, at the trial, repudiated the idea, that it is the duty of a person engaged in trade, to resort at once to proceedings under the insolvent laws, and to place his affairs in the hands of assignees, upon ascertaining that he is indebted to a larger amount than can be realized from his

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assets. But, at the same time, he held that the purchase of goods on credit by an insolvent person, after knowledge of his insolvency, and without disclosing that fact to the seller, — such buyer having no reasonable expectation of being able to pay for the goods, in the regular and ordinary course of his business, — was an unlawful act.*

The test here assumed is that of "reasonable expectation" of being able to pay for the goods purchased. This is too severe a test. It would be hardly safe to take as the standard of the criminality or lawfulness of a commercial adventure, after it had proved unsuccessful, the result to which sober and discreet minds would have come, as to "the reasonable expectation" that could have been entertained, of a more favorable issue to the adventure. Men of a sanguine temperament, easily deluded by new and visionary schemes of commercial speculation, and influenced thereby to avail themselves of that credit, which the sellers of goods are so lavish and improvident in extending, if, on failing to pay for purchases thus made, they should be strictly tried by this rule, would be found to have been engaged in unlawful acts, and to have been guilty of a violation of duty to their creditors.

The more proper rule would seem to be, that the purchase of goods by an insolvent person, knowing himself to be such, without any expectation of paying for the goods, would be an unlawful act, which might be the subject of a conspiracy. The unlawfulness of the act consists in purchasing the goods of another, and appropriating them to the purchaser's own use, without expecting to pay for them. Nothing less than this will suffice, if the goods are purchased on a credit, and with no false pretences or deceptive contrivances.

A very different case would have been presented, if the defendants had been charged with fraudulently obtaining possession of the goods, under pretence of paying cash for

* The introductory remarks of the judge of the municipal court, to which allusion is here made, were not deemed necessary to be reported, in order to an understanding of the case.

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them, upon the delivery; they knowing that they had no funds to pay with, and appropriating the goods to their own use, in fraud of the sellers. Such a case would show a deceptive contrivance or false pretence. The known inability to pay for the goods would render the act of the party a fraudulent and unlawful one. But when the sale and delivery are on a credit given to the party, although a short one, as for three or five days, the mere want of funds and known inability of the buyer to pay, at the time of the purchase, cannot have the like effect, as in the case of a purchase of goods upon a representation that the buyer will pay cash for them on delivery. In the former case, the buyer may honestly and confidently expect to receive funds, in due season, to meet his engagements; but not so in the latter.

The court are of opinion, that the instructions to the jury, upon this point, were erroneous; and, that for this and the other causes already suggested, the verdict must be set aside, and a new trial granted.

The defendants have also filed a motion in arrest of judgment, which presents the general question, whether this indictment would be sufficient to authorize a judgment against the defendants, if the verdict were allowed to stand. As the case has been long pending, and was fully argued upon this point, the court have also considered this question.

The indictment contains forty-five counts, charging in various forms fifteen distinct offences. The first count, which is a form of the indictment used as to every distinct case, and which was considered as the count that ought to be sustained, if either was good, has been the subject of our particular consideration. This count contains a general charge of conspiring to cheat and defraud an individual of his goods, without alleging any actual cheating, or the use of any false pretences to effect the cheat. It sets forth, "that the defendants, devising and intending one Philo S. Shelton to injure and defraud, on the twenty-sixth day of March, A. D. 1844, at Boston aforesaid, in the county aforesaid, did unlawfully conspire, combine, confederate and agree together, the said

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Shelton to injure, cheat and defraud, of his property, goods, and chattels."

Is this count, which sets forth no criminal object beyond what is imported by the words "cheat and defraud," and which omits to set forth any unlawful means, sufficient?

This presents a question, which, so far as we are aware, has not been directly settled by any adjudication of this court. The general principle applicable to criminal pleading requires that an indictment shall set forth, with technical particularity, every allegation necessary to constitute the offence charged; and the constitution, adopting and sanctioning this principle, provides, "that no subject shall be held to answer for any crime or offence, until the same is fully, substantially and formally described to him." Looking at the indictment in the present case, by the light of these familiar principles, we should naturally expect to find more of detail in the allegations which it contains. If an indictment for murder, should allege merely that the accused had committed the crime of murder upon the person of one A. B., or, if an indictment for larceny should simply set forth, that the defendant had stolen from C. D., in neither case would the offence be set forth with the particularity and precision required by law.

It must be conceded, however, that in indictments for conspiracy a different rule prevails to some extent; and the precise inquiry, which we have now to make, is, to what extent? The offence of conspiracy, in one respect, is doubtless peculiar. It may, unlike most offences, be committed without any overt act. A criminal purpose to do an unlawful act, or to do a lawful act by criminal means, mutually assented to or agreed upon by two or more persons, may, by such assent and agreement, ripen into crime, although no act be done in pursuance of it.

The peculiar character of this offence has fully justified, in certain cases of conspiracy, a departure from the ordinary rules of criminal pleading. The means proposed to be used to effect a criminal purpose are not, in all cases, to be set out, and are not, in all cases, required to be proved; nor are they,

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in all cases, a necessary element of the crime of conspiracy. To a certain extent, the rules upon the subject are uncontroverted. If the alleged conspiracy be an unlawful agreement of two or more persons to do a criminal act, which is a well known and recognized offence at common law, so that by reference to it as such, and describing it by the term by which it is familiarly known, the nature of the offence is clearly indicated, in such a case, a charge of conspiracy to commit the offence, describing it in general terms, will be proper.

On the other hand, if the agreement or combination be to do an act, which is not unlawful in itself, by the use of unlawful means, those means must be particularly set forth, or the indictment will be bad. The question of doubt, and upon which there are conflicting authorities, is the case of a conspiracy to do a wrongful act, in violation of the rights of another; including under the denomination of wrongful acts, those which are unlawful, because they are in violation of some statute provision, but which are not offences at common law.

The general form of allegation, adopted in the present indictment, has been comparatively rarely used in the class of cases just adverted to; much the greater number of such cases containing a particular statement of the illegal means, by which the object was to be effected. Our own reports furnish no authoritative decision of this matter. The cases of *Comm'th* v. *Ward*, 1 Mass. 473; *Comm'th* v. *Judd*, 2 Mass. 329; *Comm'th* v. *Warren*, 6 Mass. 72, which were cases of indictments for conspiracy, contain only *dicta*. These cases fully sustain the doctrine, that when a conspiracy is plainly and techically alleged, overt acts done in pursuance of it need not be set out, or, if set out, need not be proved; but that does not meet the question now presented. The English cases, on this point, were very few in number, until a recent period, when the question seems to have been more frequently the subject of consideration; since which a much greater strictness has been required in indictments for conspiracy. The case of *The King* v.

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Eccles, 3 Doug. 337, is frequently cited as an authority for a general charge of conspiracy, without any allegation of illegal means; but that case, as was said by lord Ellenborough, 13 East, 228, 231, was a conspiracy to restrain trade, and therefore a conspiracy affecting the public. *The King* v. *Gill*, 2 Barn. & Ald. 204, is a more direct authority, and may be considered as a case in point. In that case, however, it was alleged, in addition to the general charge of a conspiracy to cheat and defraud, that the defendants conspired to effect such cheat "by divers false pretences." But as these pretences were not set forth with particularity, the mere statement of them may not perhaps vary the case. The more recent English cases, however, strongly indicate a disposition to hold to a much greater strictness in indictments for conspiracy, than had formerly been supposed to be required. The cases of *The Queen* v. *Peck*, 9 Ad. & Ell. 686; *The Queen* v. *King*, 7 Ad. & Ell. (N. S.) 782, and cases there cited, sustain this suggestion.

This subject was fully considered in the court of errors of New York, in the case of *Lambert* v. *The People*, 9 Cowen, 578, which presented the same questions that arise in the present case. The court of errors, in that case, by the casting vote of the presiding officer, adjudged the indictment to be insufficient. The cases, relating to the point in question, and the various considerations bearing upon the whole subject, are fully and ably presented in the two opinions, delivered by senator Spencer on the one side, and senator Stebbins on the other. Chancellor Jones concurred in the opinion of the former, declaring the indictment to be insufficient. The case came up by appeal from the supreme court of New York, that court having sustained the indictment. The authority of this case is, of course, to be received with some qualification. It led, at an early day, to legislative enactments materially modifying the crime of conspiracy. See Rev. Sts. of New York, II. 691.

It had been supposed, that the court of Pennsylvania, in the case of *Comm'th* v. *M'Kisson*, 8 Serg. & R. 420, had

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sanctioned the form of indictment adopted in the present case; but the very recent case of *Hartmann* v. *Comm'th*, 5 Barr, 60, holds directly the contrary; adopting the principle, that, in an indictment for a conspiracy to do an act unlawful in itself, if the intended purpose be an offence at common law, it is sufficient to set out such purpose by its well known technical name; but if the object of the conspiracy be to do an act which is an offence merely by statute, the intended purpose must in such case be set forth with so much detail, as may be necessary to bring it within the description of the statute offence.

The purpose of "cheating and defrauding," which is the case now before us, does not necessarily import the commission of any indictable offence, either at common law, or by statute. It may embrace only such civil frauds as are in violation of common honesty, and for which the party is amenable to justice, not by indictment but by a civil action. Hence the necessity of alleging the purpose of the conspiracy more in detail, and with all the accompanying allegations to make it a statute offence, if the illegal means are not set forth. If the purpose of the conspiracy be to cheat by false pretences, or by false tokens, or by any other means, by which the act of cheating is made a crime punishable by statute, the means proposed to be used must be set out; not because it is necessary, in an indictment for a conspiracy, to set forth the overt acts, but because it must appear on the face of the indictment, in some form, that the object of the conspiracy is a criminal one.

We are not surprised at the disposition, so clearly indicated in the various decisions to which reference has been made, to discountenance any attempt to extend the practice of charging the offence of conspiracy in general terms. It was originally, so far as it applied to cases in which the purpose had been executed, a departure from that precision and particularity of detail, which were held requisite in other cases, and which were deemed essential to a full statement of the offence set forth in an indictment. The general form

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of indictment, to the extent of alleging a conspiracy to commit a criminal act, which is known as an offence at common law, is fully sanctioned. Beyond this, the question has been a controverted one; though, as we have seen, the tendency of the later cases has been to require the charge to be more fully set forth. In the propriety of these decisions, we are disposed to concur; and, called upon, as we now are, to establish a precedent for future cases of this kind, we have come to the result, that the first count of this indictment is defective, in not setting forth such allegations, as would show that the purposed "cheating and defrauding,"— the alleged object of the conspiracy, — were criminal acts. There being no allegation of any illegal means to effect the proposed object, the object itself should have been shown to be a criminal one.

The words "cheat and defraud" do not import any known common law offence. If punishable at all, as a crime, it is only when the cheat is effected by false tokens, false pretences, or the like; to make such an object of a conspiracy a criminal act, the combination or agreement must be to cheat and defraud in some of the modes made criminal by statute; and the indictment must contain allegations, which show that the cheat and fraud agreed upon are embraced in such statute provisions, and that if perpetrated, they would be punishable as a criminal offence.

For these reasons, we think that the first count, and the other similar and corresponding counts, are insufficient. The only remaining counts, that seemed to be relied upon by the government, are the second and others of the like form. It was urged, that the allegations contained in these counts, setting forth a conspiracy by the defendants to get into their hands and possession the goods of Philo S. Shelton, "under color and pretence of buying the same," might obviate the objection that was urged against the other counts. But these pretences are not set forth as false representations. There is no allegation that the defendants did not intend to buy, or that they did not actually buy the goods, which were deliv-

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ered to them. The fraud complained of was the not paying for the goods, and the buying without the means of paying. The result, therefore, is, that judgment must be arrested.

Robert G. Shaw & others *vs.* Leonard Stone & others.

Where one of the parties to a written contract, without objection from the other, introduces parol evidence to add to such contract, with reference to a particular point, he cannot afterwards object to the introduction of similar evidence by the other party to the same point.

A general agent, for buying and selling, cannot, without special authority, resort to extraordinary and expensive means, to raise money for his principal.

The record of a vote of the directors of a manufacturing corporation, appointing an agent, and an acceptance and record of the report of a committee, appointed to arrange with him for his compensation, do not constitute a contract in writing.

Where the clerk of a manufacturing corporation was applied to, by letter, for information as to the terms upon which a firm, of which the clerk was also a member, conducted the business of the corporation, as its agents, and made a verbal reply thereto; — it was held, that such reply was admissible in evidence against the firm, as the confession or admission of a party.

A factor, having a lien on goods consigned to him for sale, to a greater amount than the value of the goods, and being called upon by a creditor to give security, agreed with such creditor and a third person, that the latter should become the purchaser of the goods, and give his notes therefor, at an agreed price, on a credit of eight months; that the notes should be deposited with the creditor as collateral security; that the goods should remain with the factor, in order to be resold by him; that the proceeds thereof, when sold, whatever the amount might be, should be paid over to the creditor, towards payment of the debt; that the notes of such third person should thereupon be cancelled; and the agreement was carried into execution accordingly: — it was held, that the transaction was a valid sale of the goods to the first purchaser, and not a mere pledge to the creditor; and that, as between the principal and factor, the price of the goods was that for which they were first sold, and not that for which they were resold by the factor.

The agent of the H. M. Co. at Ware, being authorised for the purpose by a vote of the corporation, made drafts on D. B. & Co. of New York, payable to the order of G. S., treasurer of the company, and one of the firm of G. S. & Co., the agents of the company in Boston, which drafts were there accepted by D., one of the drawees, who was also a member of the firm of G. S. & Co., and were then indorsed by G. S., treasurer, and by G. S. & Co., and negotiated and disposed of by them for their own benefit, under an agreement with the H. M. Co. that they would pay them at maturity: G. S. & Co. having failed before the drafts became due, and being unable to take them up at maturity, the drafts, when due, were proved and allowed as claims against the H. M. Co., who had also failed in the mean time, and dividends were paid thereon by the assignees of the latter: — it was held, that the assignees of the H. M. Co. were entitled to charge the amount

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of such drafts against G. S. & Co. in account; notwithstanding, that, on some of them, the indorsement of G. S., treasurer, was made by attorney; — that some of them were paid by one of the indorsers, subsequent to G. S. & Co., without previous demand of the acceptor, and notice to such indorser; — and that some of them had been negotiated and received in payment of or as collateral security for illegal loans.

A draft, by the agent of a manufacturing corporation, payable to "G. S., treasurer" thereof, is payable to him personally, though described as treasurer, and not merely as treasurer for the time being, and may be indorsed by him, as treasurer either in person, or by attorney.

THIS was a proceeding in equity, instituted by the plaintiffs, as the assignees of the Hampshire Manufacturing Company, against the defendants, as the assignees of Grant, Seaver and company, by a bill filed on the 26th of October, 1841, under the act of 1836, *c.* 238, "to regulate the assignment and distribution of the property of insolvent debtors."

The plaintiffs set forth in their bill, that, by an indenture dated April 26, 1837, they became the assignees, according to the provisions of the act aforesaid, of all the property and effects of the Hampshire Manufacturing Company, for the benefit of creditors; that they had sold and disposed of all the property so assigned, and had paid to each of the creditors (who were named in the bill) two dividends, one of twenty and the other of fifty per cent, making seventy per cent, of their respective demands; that, by an indenture dated April 22, 1837, Messrs. Grant, Seaver and company assigned to the defendants a claim against the Hampshire Manufacturing Company, the validity of which was denied by the other creditors and by the stockholders of the company, and the payment of which had therefore been resisted, and no dividends had been paid thereon, by the plaintiffs; that the plaintiffs were and always had been ready and willing to pay to the defendants, as the assignees of Grant, Seaver and company, an equal proportion with the other creditors of the Hampshire Manufacturing Company, whenever and as soon as such assignees should establish the validity of the claim so assigned to them, and that they (the plaintiffs) always had been and were ready to adopt any legal mode of determining

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the validity and amount of such claim, but that the defendants, though requested, had neglected to take any measures for that purpose; and that, having sold all the property assigned to them, the plaintiffs were desirous to close the assignment, and to make an entire and final distribution of the proceeds in their hands, which they could not safely do, so long as the claim of the defendants, as the assignees of Grant, Seaver and company, against the Hampshire Manufacturing Company, remained unliquidated, nor until a judicial determination should be made as to the validity and amount thereof: The plaintiffs therefore prayed, that the defendants, as such assignees, might be compelled, agreeably to the provisions of the act above mentioned, to have the validity of their claim against the plaintiffs' assignors determined by a jury, upon an issue to be framed under the direction of the court, or by referees chosen by the parties; or, if the defendants should neglect to answer the bill, that they should be excluded from any participation in the funds in the hands of the plaintiffs as such assignees.

The defendants, in their answer, which was filed on the 25th of February, 1842, set forth an assignment to them by Grant, Seaver and company, as stated in the plaintiffs' bill, of a claim against the Hampshire Manufacturing Company, particularly described in a copy of the assignment, exhibited with the answer, amounting, as the defendants averred, to a balance of $174,179·20. They also contended, among other things, that two of the claims mentioned in the bill, on which dividends had been paid, namely, those of the American and Globe Banks, had been improperly admitted and allowed by the plaintiffs.

At the March term, 1842, the plaintiffs filed a special replication; and, by consent of parties, four issues were framed and directed to be submitted to a jury; one of which, at the November term, 1843, was referred to an auditor.

In January, 1844, the plaintiffs filed a supplemental bill, for the purpose of making the American and Globe Banks parties defendant; and, in May and June following, those banks filed

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answers, severally insisting upon the validity of their respective claims, and that the plaintiffs were estopped to deny them.

In December, 1845, the auditor made his report, upon the matters submitted to him; at the March term, 1846, the four issues, which had been directed to be tried, were vacated; and, on the 23d of July, 1846, the plaintiffs filed an amended bill, which is the foundation of the present proceedings.

The plaintiffs, in their amended bill, set forth specifically and in detail the several matters in dispute between Grant, Seaver and company, and the Hampshire Manufacturing Company, namely, 1st, a charge made by the latter against the former of $ 20,000, for expenses and losses incurred and paid by the former in raising money for the use of the company; 2d, a credit, claimed by the Hampshire Manufacturing Company, of $ 9,404·15, being the difference between the sum actually credited, and that which the company alleged ought to be credited, on account of a sale of goods made by Grant, Seaver and company, as the agents of the Hampshire Manufacturing Company, to William H. Odiorne; 3d, a claim in set-off for the amount of certain drafts, made by the Hampshire Manufacturing Company, for the accommodation of Grant, Seaver and company, which, not having been paid by the latter, had been allowed and in part paid by the plaintiffs as claims against the former.

The defendants, in their answer to the amended bill, insisting on the validity of the claims and demands set up by them, and denying their liability as alleged by the plaintiffs, set out at length the facts and circumstances on which they relied in defence.

Issues were thereupon severally directed, to try the validity of the claims, constituting the first and second items in dispute between the parties. The subject of the third was referred to a master, to receive such evidence thereon, as the parties might see fit to exhibit and produce before him, and to report the same to the court.

The issues thus directed were subsequently tried before *Shaw*, C. J., and were both found by the jury in favor of the

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plaintiffs, subject to the opinion of the whole court, upon certain questions of law, reserved at the trial, which will be hereafter stated.

From the report of the judge, who presided at the trial, and from the evidence stated by the master in his report, it appeared, that certain relations had existed, and certain transactions had taken place, between these parties, which, so far as the several matters in controversy are concerned, were as follows.

The Hampshire Manufacturing Company was a corporation legally established within this commonwealth, for the purpose of manufacturing cotton and woollen yarn and cloth, and of making and selling machinery, castings, and gearing, in the town of Ware, in the county of Hampshire; and for these purposes, was invested with the powers and privileges, and subject to the duties and requirements, contained in the several statutes relating to manufacturing corporations.

Messrs. Grant, Seaver and company, a firm composed of Benjamin B. Grant, George Seaver, George R. Dinsmore, and Robert Barnett, were a mercantile house established and doing business in Boston, having a branch established in New York, composed of the same individuals, with the addition of George W. Grant, under the name of Dinsmore, Barnett and company. Grant, Seaver and company were the owners of a majority in value of the shares in the capital stock of the Hampshire Manufacturing Company.

On the 20th of November, 1834, Grant, Seaver and company were, by a vote of the directors, "appointed the general agents in Boston of the Hampshire Manufacturing Company, for selling and buying, and also for taking a general supervision and control of the affairs of the company, subject, however, to instructions, from time to time, from the directors." A committee was at the same time appointed, to "make arrangements with them for their compensation as agents."

On the 4th of December, following, the committee made their report, (which was accepted,) recommending that a commission be allowed the agents of two and a half per cent

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on all sales made in Boston, and of four per cent on all sales in New York and elsewhere; that a commission of one per cent be allowed them on all purchases; that no other commission or brokerage be allowed on sales; and that the compensation thus established should be in full for the performance of the duties of treasurer and clerk, and all other services.

Immediately on their appointment, Grant, Seaver and company entered upon the performance of their duties as agents, and so continued until their failure in April, 1837. They were at the same time agents for other manufacturing companies. During the years 1836 and 1837, George Seaver, one of the firm, was clerk and treasurer of the Hampshire Manufacturing Company.

In conducting the business of the company, as its agents, Grant, Seaver and company kept books in their own names, sold the goods of the company in their own names, and took notes therefor payable to themselves. The notes so taken frequently embraced the prices of goods belonging to other companies; but, as the accounts of the several companies, for whom Grant, Seaver and company acted as agents, were kept distinct from each other, the proportion of each, in any note received by the agents, could be readily ascertained. Whenever the agents gave their acceptances for the benefit of the company, the latter was charged with the amount, and credited with the interest for the time such acceptances had to run, at the time they were given. Sales made on credit were credited to the company at the time they were made, and the interest thereon debited, and subsequently charged back, if not paid. The agents rendered their accounts quarterly to the company

On the 19th of January, 1835, the directors of the company, by a vote then passed, authorized their agents to cause any additions, alterations, and repairs to be made in the machinery used for the manufacture of woollens, and also to fill the building then used for a machine shop with machinery for manufacturing purposes, if, in their judgment, such a

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course would promote the interests of the company; provided, that the whole expense of such alterations, repairs, and additions should not exceed the sum of twenty-five thousand dollars. The directors also voted, at the same time, that the treasurer be authorized to use the credit of the company, whenever it might be required, for the importation of cotton, to an amount not exceeding forty thousand dollars, at any one time; it being understood, that the agents should meet the payment of any debt or liability thus contracted by the treasurer.

It appeared, that, from the 1st of October, 1835, to the time of the failure of the Hampshire Manufacturing Company, Grant, Seaver and company were in the practice of raising money for the use of the former, by discounts and other negotiations of mercantile paper, and by other means, at a greater rate than six per cent; but that the expenses of this kind were not charged as items of account against the company; and that no greater than the legal rate of interest appeared on the books of the agents, or in the quarterly accounts rendered by them.

On the 5th of November, 1836, the Hampshire Manufacturing Company, being indebted to Grant, Seaver and company, in a large sum of money, which the former had no available means to pay, passed a vote, that the treasurer be authorized to instruct the agent at Ware, to draw on Grant, Seaver and company, or on houses elsewhere in the United States, from time to time, for such sum or sums, as he might deem for the interest of the company, subject to the approval of the president of the company, or, in his absence, of R. G. Shaw, one of the directors; and that all drafts, thus authorized and indorsed by the treasurer, should be binding on the company.

In pursuance of this vote, drafts were drawn by Bartlett, the agent of the company at Ware, on Dinsmore, Barnett and company, of New York, payable to George Seaver, treasurer of the Hampshire Manufacturing Company. These drafts were forwarded, usually in blank, to the counting house of

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Grant, Seaver and company, in Boston, where they were immediately accepted, for Dinsmore, Barnett and company, by Dinsmore, who was a member of that house. They were then indorsed by Seaver, in person, if present, or, if absent, by Grant, as his attorney, under a power of attorney given for the purpose, which had been lost. In the former case, the indorsement was "George Seaver, Treasurer;" in the latter, "George Seaver, Treasurer, by B. B. Grant, Attorney." These drafts, when filled up, were certified as approved by the president, and were then indorsed and negotiated, as occasion required, by Grant, Seaver and company, for their own benefit. The transactions, under the above vote, did not appear on the books of the Hampshire Manufacturing Company, but were merely a mode adopted by the parties, by which to furnish Grant, Seaver and company with the use of the credit of the manufacturing company. It was at the request of Grant, Seaver and company, and upon their agreement to protect the acceptors therefrom, that the drafts so made were accepted by Dinsmore, Barnett and company; and Grant, Seaver and company were also under an agreement with the Hampshire Manufacturing Company to take up all such drafts at maturity.

On the 22d of April, 1837, when Grant, Seaver and company failed, there were outstanding debts, which had been issued and negotiated as above, and which remained unpaid, to the amount of $59,000; all of which had been presented to the assignees of the Hampshire Manufacturing Company, as valid demands against the company, and had been allowed by them as such, and payments of dividends made thereon, as mentioned in the plaintiffs' bill. The plaintiffs claimed the right to charge the amount of the drafts, so allowed by them, against Grant, Seaver and company, in account. It was objected to the allowance of this claim, that Seaver had no authority to indorse by attorney; that some of the drafts, which had been allowed by the plaintiffs as valid claims, had been paid by Shaw, one of the plaintiffs, as indorser, without any demand having been previously made of the acceptor, or any notice given to him (Shaw) as indorser; and that some

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of them had been received by banks or individuals, in payment of or as collateral security for loans and discounts, which were contrary to law. Some of the drafts, held by the American Bank, were included in a note given by Grant, Seaver and company to the bank, on settlement, but the bank continued to hold them afterwards, by agreement, as collateral security for the note.

In April, 1837, Grant, Seaver and company were liable and indebted to the American Bank in a large amount, for which they were called upon by the bank to give security. They informed the bank that they had no paper or stocks, which they could furnish for that purpose; but that they had manufactured goods belonging to the Hampshire and Neponset companies, for sale, on which they had a lien for advances and liabilities, which they had made and entered into for those companies, to an amount exceeding the value of the goods; and that they were willing that the bank should have the proceeds of these goods, when realized by a sale, to be applied in payment of their debt to the bank, provided any arrangement could be legally made for that purpose. The directors of the bank, being of opinion that the power of Grant, Seaver and company, as agents, was insufficient to enable them to pledge goods which had been consigned to them for sale, took the advice of counsel thereupon, who advised that the goods could not be directly pledged, and recommended a sale, as the best mode of accomplishing the purpose of the parties.

It was then agreed between the parties, that Grant, Seaver and company should make bills of sale of the goods, on which they had the lien above mentioned, to William H. Odiorne, cashier of the American Bank, and that his notes should be taken therefor, payable in eight months; that these notes should be deposited with the bank as collateral security for the debts and liabilities of Grant, Seaver and company; that the proceeds of the goods, when realized by a sale, should be paid to the bank; and that Odiorne should not, in any event, be called upon to pay his notes, but that the same

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should be given up, on payment to the bank of the proceeds of the goods. It was also agreed, that the bank should receive the entire proceeds of the goods, even if they exceeded the amount of Odiorne's notes, and that Grant, Seaver and company should be credited with the actual sum received for the goods, whether more or less than the amount of the notes.

In pursuance of this agreement, Grant, Seaver and company, on the 12th, 13th, and 17th of April, made bills of sale, to Odiorne, of sundry goods on which they had a lien as above mentioned, and took his notes therefor, payable in eight months, which were put into the bank as collateral security. No examination of the goods was made, either by Odiorne, or the directors of the bank. The prices were estimated and inserted in the bills of sale, at about the rates for which similar goods had been previously sold; but, at that time, there was no sale, and consequently no market price, for such goods, in consequence of the embarrassed condition of financial affairs. A formal delivery of the goods, without any removal thereof from the store of Grant, Seaver and company, was made to Odiorne, who gave a person employed by Grant, Seaver and company, as a porter, in their store, a written authority to keep possession of the goods there for him. Grant, Seaver and company, having the goods in their possession, made sales of them, from time to time, in the same manner as they sold other goods, and finally closed the balance at auction, and paid over the proceeds to the American Bank, on which the notes given by Odiorne were cancelled.

The goods belonging to the Hampshire Manufacturing Company, which were embraced in the sale to Odiorne, at the prices named in the bills of sale, and after deducting a commission of two and a half per cent, amounted to $35,301·04, which was credited to the company, in the books of its agents, under date of April 27th, as the amount of sales to Odiorne. The sum paid the bank was $25,896·89. The company, some time subsequent to the 22d of April, 1837, made a demand upon Odiorne, for the goods sold to him, with which he refused to comply. The

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plaintiffs claimed an allowance of the whole sum for which the goods were sold to Odiorne.

The first issue was directed to try, whether the defendants, as the assignees of Grant, Seaver and company, were entitled to charge and be allowed the sum of $20,000, or any part of such sum, for the losses sustained by Grant, Seaver and company, in raising money to carry on the business of the Hampshire Manufacturing Company, from the 1st of October, 1835, to the time of the failure of the latter, as charged in the accounts exhibited by the defendants, in their answer to the plaintiffs' amended bill.

On the trial of this issue, the defendants called Grant, Dinsmore and Barnett, three of the partners in the firm of Grant, Seaver and company, and inquired of them severally, whether Grant, Seaver and company had agreed, at their own cost, to advance capital for the use of the Hampshire Manufacturing Company; to which the witnesses testified that they had not so agreed; and this evidence was received without objection on the part of the plaintiffs.

The plaintiffs subsequently offered evidence of conversations between Dixon, the president of the Hampshire Manufacturing Company, and Grant, one of the firm of Grant, Seaver and company, previous to the 20th of November, 1834, and also of conversations between Grant, Dixon, and Coolidge, one of the directors of the Hampshire Manufacturing Company, at a time between the 20th of November, 1834, and the 4th of December following, for the purpose of proving therefrom, that Grant, Seaver and company, as agents of the Hampshire Manufacturing Company, undertook and agreed to furnish the company with capital or funds from their own resources, at the rate of six per cent. This evidence was objected to by the defendants, but admitted, subject to their exception.

The plaintiffs also offered in evidence, for the same purpose, a letter addressed by Parks, Wright and company, to George Seaver, clerk of the Hampshire Manufacturing Company, requesting information from him as to the terms on

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which Grant, Seaver and company transacted the business of that company; and the plaintiffs also offered proof of a verbal reply made to this letter by Seaver. The defendants objected to the admissibility of the letter and reply as evidence, but the same were admitted, subject to their exception.

The second issue was directed to try, whether the plaintiffs were entitled to claim and be allowed, as a credit in the accounts between Grant, Seaver and company, and the Hampshire Manufacturing Company, the sum of $9,404·15, or any less sum, in addition to a credit of $25,896·89, exhibited and allowed, as a credit to the latter, on account of the goods sold to Odiorne.

On the trial of this issue, the facts relating thereto appearing as already stated, the court directed the jury thereon, as matter of law, that the plaintiffs were entitled to be allowed, as a credit, the said sum of $9,404·15, in addition to the sum previously credited.

The jury, under these instructions, and upon the evidence submitted to them, found both issues in favor of the plaintiffs; subject to the opinion of the whole court, upon the exceptions taken, as above stated, to the evidence for the plaintiffs on the first issue, and to the correctness of the instructions with reference to the second.

The third and last subject in dispute was the claim of the plaintiffs to be allowed to charge, by way of set-off, against Grant, Seaver and company, the amount of the drafts drawn for their accommodation by the Hampshire Manufacturing Company, which were outstanding at the time of the failure of Grant, Seaver and company, and which were afterwards allowed by the plaintiffs and in part paid as valid claims against the Hampshire Manufacturing Company.

The cause was argued at a former term, by *R. Choate* and *E. Blake*, for Shaw and others; by *C. G. Loring* and *C. B. Goodrich*, for Stone and others; by *T. Parsons* and *T. P. Chandler*, for the American Bank; and by *W. Gray*, for the Globe Bank.

Shaw, C. J. This is a bill in equity, commenced by Shaw,

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Blake and Seaver, assignees of the Hampshire Manufacturing Company, against Leonard Stone and others, assignees of Grant, Seaver and company, formerly merchants, and agents and factors of the Hampshire Manufacturing Company.

In April, 1837, the parties were in failing circumstances. On the 22d, Grant, Seaver and company made an assignment to Stone and others, of the balance of account due to them, as such agents and factors, from the Hampshire Manufacturing Company, and, on the 27th of the same April, the latter made an assignment of their property, generally, in trust for their creditors.

Some time after this last assignment, and after many claims made upon the assignees by persons claiming to be creditors of the Hampshire Manufacturing Company, their assignees filed this bill against the assignees of Grant, Seaver and company, calling upon them to prove and establish their claims, setting forth some of them specifically, and denying their validity, and claiming that if not so established, they might be debarred and precluded from asserting such claims, so as to enable them to distribute the proceeds of the assigned property amongst the creditors entitled to them. After answers, an amended bill and additional answers, two issues were directed to try two contested questions, hereafter stated. Various matters were also referred to a master, who has made a report.

Upon the issues thus directed and found by the jury, and a report of the judge before whom these issues were tried, and upon the report of the master, taken as a statement of facts, several questions arose, which have been argued and considered by the court.

The first issue was directed to try whether Grant, Seaver and company were entitled to charge the Hampshire Manufacturing Company with the sum of $20,000, or any other sum, for the cost and expense of raising money for their use. This charge was made on the 27th of April, 1837, after Grant, Seaver and company had stopped payment, and made an assignment to Stone and others of the balance due to them

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from the Hampshire Manufacturing Company. The jury returned a verdict in favor of the plaintiffs, thereby deciding that Grant, Seaver and company had no right to make the said charge against the Hampshire Manufacturing Company; and this verdict must stand, unless the objections taken by the defendants to the admission of evidence are well founded.

The agents, Grant, Seaver and company, kept their accounts regularly with the Hampshire Manufacturing Company, charging and crediting interest, and rendered those accounts quarterly to the manufacturing company. The charge in question was not founded on items, but on an estimate of the expense, which Grant, Seaver and company had previously incurred, by discounts at a greater rate than six per cent, or otherwise, in raising money to meet the wants of the Hampshire Manufacturing Company. No express contract was offered to sustain this charge; but it was placed on an implied liability, arising from the relations, in which the parties stood to each other, as principals and factors and general agents, and the exigency which they were under, as such factors and agents, to raise money for the company, at high rates of interest, beyond the regular interest charged in their quarterly accounts. They then proposed to show that money was so raised for the use of the manufacturing company, and thus to establish an implied promise on the part of the latter, to pay the expense of the operation. This being a charge made by the respondents, the assignees of Grant, Seaver and company, the burden was on them to establish it; and they took the affirmative and opened the case.

Much evidence was offered on both sides, which is not stated in the report, and upon which no question arises. It appeared, that Grant, Seaver and company were themselves large stockholders in the Hampshire Manufacturing Company, and owned a majority of the shares. It became a question between the parties, whether or not, at the time when Grant, Seaver and company were appointed factors and general agents of the Hampshire Manufacturing Company, these agents undertook, in general terms, to advance money and accept drafts,

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and thus by their cash and credit to afford means to the company, when not afforded, and beyond those afforded, by their sales of manufactured goods, and the proceeds of them, to carry on the business of the company, in making repairs, and improvements at the factory, paying operatives, purchasing stock, &c. It was insisted by the company, that it was understood and agreed, that the agents would thus afford means by their own money and credit to carry on the business, not for any certain length of time, nor to any particular amount, but as a general course of business; but this was denied on the other side. The assignors, having been discharged, were competent witnesses, and three of them, Grant, Dinsmore and Barnett, were called by the defendants, as witnesses, to maintain the issue on their part. They were severally inquired of, whether, when they took the agency, they agreed to advance, at their own costs, capital for the use of the Hampshire Manufacturing Company; to which they testified that they did not. Subsequently, and after Shaw and others, the plaintiffs, had entered on their defence to this charge of $20,000, they offered parol evidence of conversations between Dixon, on the part of the company, and Grant, on the part of Grant, Seaver and company, before the 20th of November, 1834, the date of the vote by which the latter were appointed agents, and also between that day and the day of the acceptance of the report of the committee, December 4th following, to maintain the issue on their part, and to prove that Grant, Seaver and company, as such agents, undertook and agreed to furnish said company with capital or funds, from their own resources, at six per cent. The plaintiffs also offered in evidence, for the same purpose, a letter addressed by Parks, Wright and company, to George Seaver, clerk of the Hampshire Manufacturing Company, requesting information as to the terms, on which Grant, Seaver and company held the agency of the former, together with a verbal reply of Seaver thereto.

I. This evidence was objected to, on the part of Stone and others, but was admitted by the court, and this is the subject

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of the first objection. This objection is placed on the ground, that by the vote of November 20th, 1834, and the subsequent acceptance of the report of the committee on the compensation of the agents, a contract in writing was made between the parties, which ought not to be enlarged or altered by paro evidence.

To this objection, there are several answers:

1. As the rules of evidence are made for the security and benefit of parties, all exceptions may be waived by mutual consent; and, in each particular case, an objection may be waived by the party, who has a right to except. Now, when this species of evidence was offered by Stone and others, in order to prove what was the agreement and understanding of the parties, even though it might have been open to the exception stated, the defendants waived their exception by offering it, and the other party waived theirs by not excepting to its admission. To what extent did this waiver go? We think to the introduction of parol evidence bearing on the same point, and which tended to prove what was, or was not, the agreement and understanding of the parties, at the time of the establishment of the agency, in regard to one important particular. It was not merely a waiver as to the particular question, but to the species of evidence, as bearing upon that point in the issue. It is said, that the admission of incompetent or illegal evidence, on one side, not objected to, does not warrant the admission of incompetent evidence on the other side, when objected to. This principle is true, but is not applicable to the present case. When a party waives his exception to a particular species of evidence, alike in character, it ceases to be incompetent, and all evidence of the like kind, if pertinent, is admissible. A contrary decision would seem to violate the maxim, *audi alteram partem*, which lies at the very foundation of all regulated and intelligent judicial inquiry.

2. But another, and perhaps a more satisfactory ground, on which the testimony is admissible, is, that here was no contract in writing, no mutual agreement reduced to writing,

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expressing the undertakings and obligations of the parties, on both sides. The vote of November 20th appointed Grant, Seaver and company general agents in Boston, for selling and buying, and also for taking a general supervision and control of the affairs of the company, subject to instructions from time to time from the directors. Nothing is said about the specific duties, which these agents are to perform, except what is implied in these very general terms, "general agents for selling and buying and taking a general supervision." The nature and extent of those duties must be proved *aliunde*. But, at the same time, a vote was passed, appointing a committee to make arrangements with Grant, Seaver and company for compensation. The extent of the committee's authority was to arrange for compensation; and their report is accordingly limited to the subject of compensation to Grant, Seaver and company, as selling and purchasing agents, including brokerage, and the performance of the duties of treasurer, clerk, and all other services; it does not purport to be a statement of the duties to be performed by the agents. But, further, this report has none of the characteristics of a written contract. It is in writing, because a corporation or board of directors must necessarily keep a record, journal, or written memorandum, of their doings, for their own information, and that of their associates and successors. But it is not signed by the parties; it is not ordered to be communicated to the agents for their acceptance; nor does it appear that the agents in fact accepted or acted upon it. It was merely information, given by the committee to the directors, of what they had verbally agreed upon with the agents. It is like a letter written by a party to one as agent, to govern him in dealing with another person; it may be evidence of a contract, but is not itself a written contract with that person. *Knapp* v. *Harden*, 6 Car. & P. 745.

3. If this vote and report together constitute the entire mutual agreement of the parties, so as to be unalterable by any parol evidence, which could be offered, we see no ground upon which the action can be mai tained. Factors, as such

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are not authorized to go into the money market and to pay large bonuses and premiums, and high rates of interest for money, and charge such payments to their principals. Grant, Seaver and company were buying and selling agents, having a general supervision of the affairs of the company. They had no authority, resulting from that relation, to take such measures, and to make such charges against their principals; that not being a course of proceeding within the scope of the ordinary duty of such agents. Their only authority was, to receive the manufactured goods and dispose of them, and to use and employ the funds and means placed at their disposal by their principals. They could not take extraordinary and expensive means to raise money without special authority, or without proof of some other relation or agreement between the parties, than that arising out of the ordinary relation of principal and factor, as constituted by the vote relied on. The court are of opinion, that this evidence was rightly admitted.

The other objection, namely, to the admission of the letter from Parks, Wright and company to George Seaver, and the verbal reply of the latter thereto, we think, is already answered, if parol evidence be admissible. Very soon after the commencement of this agency, a letter was addressed to Seaver, who was at the same time clerk of the Hampshire Manufacturing Company, and one of the firm of Grant, Seaver and company, making an inquiry of him in regard to the terms on which the business of the manufacturing company was to be transacted by its agents. This letter was written by Parks, Wright and company, who had formerly held the same agency for the Hampshire Manufacturing Company. To this letter, Seaver made a verbal reply. This was objected to, but admitted.

It is obvious, that this letter of itself was wholly immaterial; it stated no fact and had no bearing, but to give effect to Seaver's answer; and the only real question is, whether that answer to the question thus proposed was competent evidence. Seaver was one of the firm of Grant, Seaver and

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company, who were then the parties alone concerned in this account, and under whom the defendants claim as assignees, and on whose rights they must stand. It is therefore the declaration of a party, and so admissible as a confession, which the other party has a right to give in evidence. It is admissible, because he was a party to the arrangement, and is supposed to know the fact; and, as a party, would not admit it unless true. He was one of the same firm, three of whom had been called and offered as witnesses on the other side. It is no objection, that he was an officer of the Hampshire Manufacturing Company, or that the letter was addressed to him in that capacity; he was not the less a party, as one of the firm of Grant, Seaver and company, so that neither he, nor those in privity with him, can object to the admission of his statements as evidence, at the instance of the other party.

The court are therefore of opinion, that the objections, made by the defendants to the admission of evidence, were not well founded; that the evidence was rightly admitted; and that the verdict for the plaintiff upon the first issue, disallowing the charge of $20,000, made by Grant, Seaver and company, against the Hampshire Manufacturing Company, must stand.

II. The subject of the second issue presents a question of much more difficulty. The facts being all undisputed, a *pro forma* verdict was taken for the plaintiffs by consent of parties, subject to the opinion of the whole court upon a case to be reported.

On the subject of this sale to Odiorne, the court are of opinion, that, as between the Hampshire Manufacturing Company and their assignees, the plaintiffs, on the one side, and Grant, Seaver and company, and the defendants, their assignees, on the other, the sale to Odiorne must be deemed a valid sale, at the prices specified, and therefore that the company are entitled to be credited with the amount of that sale, $35,301·04, instead of the amount for which the goods were afterwards sold and credited to the American Bank, $25,896·89, making a difference in the sum of $9,404·15

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These sales, or supposed sales, took place on the 12th, 13th and 17th of April, 1837.

Grant, Seaver and company were largely in advance for the Hampshire Manufacturing Company, to an amount greater than the goods thus transferred to Odiorne, under the agreement with the American Bank. Still, they were factors and not owners; they had a lien on the goods for their general balance, but the right of property was in the company. As factors, they had no authority to pledge the goods for their own debt. Such a contract would pass no property to the pledgee; it could have no such effect by virtue of a right of property, because the agents had no such right; nor in virtue of their power as agents, because in making such a contract they would not be pursuing their power. Besides, by abusing their authority and parting with the possession, in the manner supposed, they would lose their lien, and the general owner would then be entitled to recover of the pledgee, in trover, without paying or deducting the amount for which the factor had a lien; and so, if, after such a pledge, the goods be nominally sold to the pledgee, not in the usual course of a mercantile sale. *Kuckein* v. *Wilson*, 4 Barn. & Ald. 443.

The real and legal power, however, which Grant, Seaver and company had over these goods, was to sell them for cash or on credit. And as their lien would extend to the proceeds, as well as the goods, whether in notes or cash, and as they, being greatly in advance for the Hampshire Manufacturing Company, had a disposing power over the proceeds, they might agree, on making the sale, that the proceeds, to wit, in the present case, the notes, should be applied in satisfaction of or as security for their own debt. *Hudson* v. *Granger* 5 Barn. & Ald. 27.

If an agent, with authority to consign goods by an indorsement of bills of lading for sale, does so, and authorizes the consignee to sell and apply the proceeds to a debt of the agent, though the authority to sell will be valid to pass the property to the purchaser, if sold in a mercantile way, and in due course of business, yet the purchaser will be liable to the

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owner for the proceeds, because the authority given by the agent to the consignee, to apply the proceeds to his own demand, is void. But, it seems, if the sale be hurried in order to enable the factor to realize his advances, and is not made in due course of business, it will be void. *Stierneld* v. *Holden*, 4 Barn. & Cres. 5. The law thus stated seems to be very clear. It was so understood by the parties, and they were so advised by counsel.

What, then, could Grant, Seaver and company do, to accomplish the object they had in view, which was to satisfy or secure their debts and liabilities to the American Bank, and to make their right over these goods available for that purpose? They could not pledge the goods; by attempting to do so the bank would obtain no security, and the factors would lose their lien. Had the transaction been in substance a pledge, under color of a sale, or in any other disguised form, the result would have been the same, on proof of its real character. But the agents had power to sell, and to give a long credit, and thereupon to take negotiable notes, and to apply those notes to satisfy their own debt to the bank. In doing this, they were bound as factors to sell at reasonable and fair prices; and it would be contrary to their duty, and a fraudulent proceeding, on their part, to sell the goods at a greatly reduced price, or, in common parlance, to sacrifice them, in order the more hastily to realize the proceeds. In the actual state of the market, as the case finds, there was no regular demand for such goods, and no fixed market price. But the price, at which similar goods had been selling for some months previously, might properly be taken to be the fair value of the goods, as between the owner and factor, independently of the particular crisis in mercantile affairs, which then existed.

We think, therefore, that the actual intent of the parties, and the legal effect of the transaction, was, an execution by Grant, Seaver and company of their legal power to dispose of the goods by a sale; to make a valid sale of them, so as to divest the right of property of the Hampshire Manufac-

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turing Company; and to obtain notes for the price, and to dispose of those notes, as they lawfully might do, to meet their own debt. They agreed with Odiorne and the bank, that the proceeds of the goods, when resold, should be taken in full satisfaction of the notes of Odiorne, although such proceeds might fall short of the full amount of the notes. This might subject Grant, Seaver and company to a loss, if the resale of the goods should be made at reduced prices, as the event showed that they were; but the agents might well hope, that, during the eight months, which the notes had to run, the market might revive, and the goods sell at little or no reduction from previous prices. But, should it not be so, it would be a loss, which must rest on them. It is true, that Grant, Seaver and company agreed, that the actual proceeds of the goods, upon a resale, by them, should be taken in full satisfaction of the notes of Odiorne, and that they should not be held to account for them to the bank at the nominal price at which they were sold to Odiorne. This was an agreement which Grant, Seaver and company had full power and lawful authority to make, in virtue only of their disposing power over the notes; and was not an agreement which they had any authority to make as factors, in virtue of their authority under the Hampshire Manufacturing Company; and consequently, such agreement could not bind the company. The loss, therefore, must fall on the notes taken for the goods, which were the property of Grant, Seaver and company, and for which, in a certain contingency, they agreed to take less than par; and not on the sales of the goods, which must have been void, had not a real and actual sale been made.

The chance of loss, which might arise from the transaction, the factors might have been willing to take, in accomplishing a measure which would enable them to weather the existing storm, and as the best expedient, which, under the circumstances, they could resort to. Taking it as a real sale, it was a measure, by which the right of property of the Hampshire Manufacturing Company in the goods was divested, and the right of Grant, Seaver and company, and their assignees,

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in the notes, was legally established. So the parties considered it; the bill of sale was made out and delivered to Odiorne; and the goods were delivered to him, and placed in the custody of his agent. The sales of the goods were credited in the books of Grant, Seaver and company, on the 27th of April, as of an actual sale to Odiorne. When, after the failure, the Hampshire Manufacturing Company demanded the goods of Odiorne, the demand was not complied with; though had it been a pledge to him, the appointee and agent of the American Bank, he would have been bound to deliver the goods on that demand. If the goods were afterwards in fact sold by Grant, Seaver and company, it must have been done by them under the authority and for the account of Odiorne and the bank, and not on the authority or for the account of the Hampshire Manufacturing Company. The company could have had no claim against them for any neglect, default or misconduct, as agents, for any breach of duty in the sale. For aught that appears, the bank, and Odiorne, as their appointee, might as well have appointed any other agent to sell the goods; at all events, the Hampshire Manufacturing Company could have no control over them, in that respect.

To decide that this was not an actual sale, but only a mode of pledging the goods, would be to give to a mere colorable and pretended sale, operating in the nature of a pledge, more force and effect, than, it is admitted, an actual pledge made in perfect good faith would have had. It is not for Grant, Seaver and company, or those standing in their place, after adopting a course, which they might adopt, as a real sale, and which divested the title of the owners of the goods, afterwards, and after having taken every step necessary to make it an actual sale, to turn round and say, that it was merely colorable and pretended; and the defendants, who came in merely as assignees, taking the same rights, subject to the same deductions and the same equities, with the assignors, are bound by all acts which bind their assignors. These transactions took place on the 12th, 13th and 17th of April,

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and the defendants took their assignment on the 22d of the same month. Taking as assignees of a balance of account, they must be bound by every item in the account, which belonged to it as it then stood, although the transactions previously commenced, out of which it arose, and which it properly embraced, were not then completed, or entries thereof then made; the account may be adjusted afterwards.

It appeared that the sum of $35,301·04 was credited by Grant, Seaver and company in their books to the Hampshire Manufacturing Company, on the 27th of April. This is not perhaps of much importance; but, as indicating the light in which Grant, Seaver and company viewed the transaction, and intended to represent it, and have it understood by their principals, it may be regarded as worthy of some consideration. It was urged, that this entry could not bind their assignees, because it was made after the assignment. It is true, that if the assignment was made on the 22d, and the Hampshire Manufacturing Company had notice of it, nothing could be done afterwards by the assignors to discharge the debt, or essentially to diminish or vary it. But, without stopping to inquire whether the Hampshire Manufacturing Company had such notice or not, it is obvious, that this entry had no such tendency; if the company were entitled to the credit, they were entitled to it when the sales to Odiorne were made, which were before the assignment to Stone and others.

III. The next great subject of controversy between these parties arises from the claim of Shaw and others, as assignees of the Hampshire Manufacturing Company, to charge by way of set-off, against Grant, Seaver and company, the amount of certain drafts, drawn by the agent of the former, and indorsed by the treasurer, which were known in the discussion of the case as "facilities."

These were drafts, drawn by Bartlett, the agent of the company, at Ware, on the house of Dinsmore, Barnett and company of New York, which was in fact a branch of the house of Grant, Seaver and company; the drafts were then

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forwarded by Bartlett to the counting room of Grant, Seaver and company, in Boston, oftentimes, and, perhaps it may be said, commonly, in blank; there they were accepted by one of the firm of Dinsmore, Barnett and company, in the name of that house, such member residing here; they were made payable to George Seaver, treasurer, and were sometimes indorsed by him personally, if present, otherwise and oftentimes, by Grant, as the attorney of Seaver, Grant having, as he testified, a power from Seaver for that purpose, which had been lost. These drafts were marked as "approved" by Dixon, the president of the company, and were then taken by Grant and negotiated, as occasion offered, to raise money, or to make payments, for the benefit of Grant, Seaver and company.

A vote had been previously passed by the directors, authorizing such bills to be drawn for the benefit and accommodation of Grant, Seaver and company, under an agreement that Grant, Seaver and company would provide for them, and take them up, at maturity. This was an expedient adopted to enable Grant, Seaver and company to use the credit of the Hampshire Manufacturing Company, not for raising money for the company particularly, but generally for their own use and benefit. The transactions under this vote did not appear in the books of the Hampshire Manufacturing Company; they were simply a loan of the credit of the company to Grant, Seaver and company, who issued the drafts at their discretion, and agreed to provide for them when they became due.

In consequence of the failure of Grant, Seaver and company, it became impossible for them, according to their agreement, to pay and take up those of the drafts so issued, which had been negotiated and were then outstanding, amounting to the sum of $59,000. The drafts so outstanding were presented to the assignees, as valid demands, against the manufacturing company, and were allowed, and dividends were paid thereon, to the amount of seventy per cent. The assignees claim a right to charge these drafts in their account, by way of offset against the estate of Grant, Seaver and company, on the ground, that the drafts were issued for their

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accommodation, that, by agreement, Grant, Seaver and company were principal debtors, and that the manufacturing company, having, in effect, paid and taken up the drafts, as the drawer or indorser, has a right thus to make use of them as a valid set-off against the amount which the company owed Grant, Seaver and company.

The defendants, as the assignees of Grant, Seaver and company, resist this claim on various grounds, applicable to the different securities, all however founded on the principle, that, if from any cause, the Hampshire Manufacturing Company were not bound and compellable by law to pay all or any of these drafts, — if it could have resisted such payment on any grounds, meritorious or technical, — it could not, by such payment, make Grant, Seaver and company debtors; but that such payment must be considered as a payment in its own wrong, and the loss its own.

An objection, which goes to many of the drafts, is, that the vote of the directors, November 5th, 1836, was not pursued in several particulars, and so the company was not bound. It provided, that such drafts, subject to approval, &c., and indorsed by the treasurer, should be obligatory, &c. Many of these drafts, instead of being indorsed by George Seaver, personally, as treasurer, were indorsed "George Seaver, Treasurer, by B. B. Grant, Attorney." It is objected, that, as the treasurer himself exercised a delegated authority, he could not execute such authority by attorney, or delegate his authority. In order to estimate the weight of this objection, it becomes necessary to consider the relation in which the parties stood to one another, and the nature and character of these securities. This general view will embrace many, perhaps most, of the exceptions taken to this claim of the plaintiffs.

1. These bills were not drawn by the Hampshire Manufacturing Company, and were not intended to be drawn, against funds. Dinsmore, Barnett and company, the nominal drawees, were a branch of the house of Grant, Seaver and company. Dinsmore resided here, and, in most instances, accepted the bills in the counting room where they were prepared. Grant

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Seaver and company, by agreement, were to stand in place of acceptors, and, as between them and the drawer and indorsers, were the debtors first in order and responsibility.

But the question is, what were the rights of the holders of these drafts, and what were their claims against the Hampshire Manufacturing Company, as the drawer, when the drafts were presented to the plaintiffs for allowance. The persons, by whom they were presented, were holders for value of negotiable securities, taken in the regular course of business, before they became due, and without notice. Their rights did not depend on the vote above mentioned; that vote did not appear on the face of the drafts; and the holders cannot be presumed to have had notice of it. The drafts were drawn by a general and authorized agent of the company, and were made payable to George Seaver, treasurer. This mode of naming the payee, for aught that appears on the drafts, was a *descriptio personæ*. At all events, Seaver appeared as payee, and might indorse by attorney. The drafts, being made payable to George Seaver, personally, described as treasurer, were not like bills made payable to the treasurer for the time being, whoever he might be, but were payable to George Seaver, as a person. Whatever might be his general power as treasurer, his power to indorse drafts, thus made payable to him personally, was an original and not a delegated power, and might be well executed by an attorney lawfully authorized.

2. But the whole case shows, that these drafts were indorsed by Grant, Seaver and company, after the indorsement of Seaver, treasurer, and were put in circulation for their own benefit, and the proceeds applied to their own use. Their subsequent indorsement was a guaranty to the holder, that all the prior indorsements were genuine and regular; and, in any claim against them, by the holder of a draft, they could take no exception to such defective indorsement.

3. The fact, that these bills were issued after they had been approved by Dixon, as president of the Hampshire Manufacturing Company, may be regarded as having some weight. By the vote of the directors, authorizing such an issue of

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bills, it is provided, that it should be done with the approval of the president. This approval was an assurance, on the part of the company, accompanying the bill, that the draft, as drawn, accepted, and indorsed, was in conformity with the requirements of the directors; and if holders could be supposed to be required to make any inquiry, it tended to preclude such inquiry, by a certificate which might be regarded as satisfactory.

An objection was taken, that some of these drafts had been paid by Shaw, as indorser, without demand on the acceptor, and notice to him as indorser, and that many of them were allowed by the trustees as debts against the company.

There is very good ground to maintain, that, as between these parties, the Hampshire Manufacturing Company, on the one side, and Grant, Seaver and company, on the other, the ordinary rules of law and practice, regulating the rights of parties to bills of exchange, made and negotiated in due course of business, do not apply. This remark is not applicable to third parties, holders of these bills; they were not parties to the original arrangement, under which the drafts were issued, and must stand on their legal rights against the respective parties to the bills, as such holders. But by the original arrangement between the parties, the credit of the company, in the form of these bills, was loaned to Grant, Seaver and company, and was to be wholly redeemed by them. It would seem, therefore, that after a failure, and after the time when Grant, Seaver and company had become unable thus to redeem the drafts, and when any demand and notice would be utterly unavailing and useless, the company, when called upon, might waive all such useless and expensive formalities, and might pay or allow the drafts to be proved as debts; and, if they thought fit to waive such exceptions, Grant, Seaver and company, who were bound as principals, and at all events, to pay, could not object. It has been held, that an indorser, who has paid a bill, bringing an action against a prior party, is not bound to show that he himself, as such indorser, was notified, or would have been legally liable. It

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is enough, that he has paid, as indorser, and taken up the bill, without showing that he was legally compellable so to do. *Elsworth* v. *Brewer*, 11 Pick. 316.

4. But we have not thought it necessary to place the decision upon that ground; there is another which appears to us more decisive.

These bills were drawn by the authorized agent of the Hampshire Manufacturing Company, a trading company with power to draw bills, solely for the accommodation of Grant, Seaver and company, on a branch of their own house, to wit, on Dinsmore, Barnett and company, who had no funds in their hands, or, what is the same thing, for this purpose, none applicable to the payment of these drafts. In this case, therefore, the right of the holders, to proceed against the company as the drawer, was perfect, without demand on the acceptor, or notice to the indorsers. *Walwyn* v. *St. Quintin*, 1 Bos. & Pul. 652. Nor, supposing them to be foreign bills, would a protest be necessary. *Legge* v. *Thorpe*, 12 East, 171.

Another objection taken to some of these drafts is, that they were held by banks or others, who had taken them in payment or as collateral security for illegal loans, or discounts made on blue books or otherwise contrary to law. We have not thought it necessary to inquire very minutely into the character of the alleged illegal loans and discounts, because we think, that, whether illegal or not, it is not an objection, which the drawer of these drafts, the company, could have made, and it is therefore not one which these defendants can make. Supposing the contract to be illegal, between the parties to it, it cannot affect the liability of parties, who did not participate in the transaction. The drawer of a negotiable instrument cannot defend himself when called on for payment, by showing that the holder obtained it in part consideration of a transaction which was contrary to law.

Another objection is taken to a part of these drafts, being those held by the American Bank, that Grant, Seaver and company made a settlement with the bank, and gave them

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a promissory note for the amount, which is in law a payment of the drafts. But we are of opinion, that this objection cannot prevail. Whether a note given on a settlement is payment or not depends upon the stipulations of the parties. In this commonwealth, it affords a presumption that it was intended as payment. But it is a presumption of fact, and may be rebutted by proof of the true agreement. In this case, it was found, at the time of that settlement, and when the note was taken, it was agreed, that the drafts should be held as collateral security, that is, that the responsibility of the other parties should not be given up. Though, as between these parties, between whom this was all accommodation paper, Grant, Seaver and company were the principal debtors, yet, on the paper, they were only second indorsers. The bank had a right to deal with it, as it appeared to be, that is to say, paper on which the company was the drawer, and Grant, Seaver and company second indorsers. By the settlement with the latter, they did not discharge the company, who were prior parties.

Decree to be entered accordingly.

CHARLES HEATH & another *vs.* THE FRANKLIN INSURANCE COMPANY.

In a policy of insurance against fire, the building insured was described as a brick building, with "a composition roof, occupied by several tenants, and connected by doors with the adjoining building, situate at the corner of Charles Street and the Western Avenue:" it was held, that the latter words, "situate," &c., referred to the building insured, and not to the adjoining building.

If, in a policy of insurance against fire, which is evidently intended to apply to one of two buildings, the description be false in one particular, when applied to one building, and false in a different particular, when applied to the other, the policy will attach to that building, which, after rejecting as surplusage that part of the description which is false when applied to it, is the most clearly and sufficiently, provided it be sufficiently identified by the residue of the description; and, in considering, with a view to the adoption of the one or the other of the two hypotheses, which of the two particulars of the description to reject as false, the court will have regard to their relative importance as descriptive; but, if the residue of the description, after rejecting each of the particulars as false de

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not, in either case, sufficiently identify the building insured, the policy will be void for uncertainty.

A policy of insurance against fire provided, that a loss should be paid in ninety days "after proof thereof," and that the insurers should have the right to rebuild, at any time, within ninety days, "after notice of the loss;" the assured wrote a letter to the insurers, informing them that it "had become necessary for the assured, under policy 8650, to give notice of a loss or damage to the premises insured, which happened on the evening of the 12th instant, and to request that they may be indemnified, according to the effect of that policy;" and no objection was made by the insurers to the form of the notice, or any request expressed for further or more particular information relative to the loss; it was held, that the letter was a sufficient compliance with the terms of the policy, as to proof and notice of loss.

This action, which was upon a policy of insurance against fire, was tried before *Shaw*, C. J., from whose report thereof the following facts appeared.

The policy was dated January 6th, 1842, and by it the defendants caused the plaintiffs to be insured, to the amount of six thousand dollars, on their brick building, with a "composition roof, occupied by several tenants, and connected, by doors, with the adjoining building, situate at the corner of Charles Street and the Western Avenue, in Boston. A cabinet maker's shop is in the building."

The policy also contained a clause, providing, that, "in case of any loss, the same is to be paid, without any deduction, in ninety days after proof thereof;" and a further clause, that "the assured agrees, that in case of any loss, or damage, the said company shall have the right to replace the articles lost or damaged, with others of the same kind and equal goodness, at any time within ninety days after notice of the loss."

The plaintiffs introduced evidence tending to prove, that, at the time the policy was effected, a block, consisting of two brick buildings, belonging to the plaintiffs, stood at the corner of Charles Street and the Western Avenue, the most easterly of the two being directly on the corner of the street; that the last named building was much older than the other and most westerly one, and, before the latter was built, had attached to it a brick, two-storied spur or L part, containing a kitchen in the lower story, and a breakfast room over it in the upper;

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that, when the westerly building was erected, the northern wall was joined on to, and built over, the spur part, so that the wall of that part was incorporated into and made a part of the northern wall of the new or westerly building, and the rooms of the latter building, in the third and fourth stories thereof, extended over the rooms in the L; that the wall between the easterly and westerly building was entirely of brick, from the cellar to the roof, and there were three doors through it, namely, one leading from a room in the lower floor of the easterly building, occupied as a grocery, into a corresponding room in the westerly building, — a second leading from the entry of the eastern building into the lower room of what was previously the spur or L, — and a third in the second story of the easterly building, leading into the room which was before the upper room of the L; that the building on the corner, at the time the policy was made, was occupied by several tenants, was covered by a flat composition roof, and had doors in the partition wall between it and the western building; that the western building was occupied by several tenants; that it had a hipped roof, with a space on the top, of about one hundred feet, covered with composition, the remainder, containing about fourteen hundred and fifty feet, being steep pitched and slated; that in this building there was a carpenter's shop; and that, within the period mentioned in the policy, a fire occurred on the premises, by which the western building was partially consumed, and the eastern slightly injured.

The defendants contended that the policy, upon the face of it, was void; or, if not void, that it covered the easterly house only. But the presiding judge ruled, that, if the wall, constituting the original western wall of the main part of the house first built, was carried up higher, and formed the easterly wall of the new westerly building, and included in such new building the former kitchen and breakfast room, or L part; if there was no connection between such new westerly building and the old house, but by three or four doors, such wall being carried up above the roof of the old house, to

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constitute the easterly wall of the new one; if each part was occupied by several tenants, and each was a brick building, the easterly house covered with a composition roof, and the westerly in part with a composition roof; and if there was a cabinet maker's shop in the westerly building, and no cabinet maker's shop in the easterly building, each being connected with the other by doors; then the building insured was the one lying westerly of the wall, and that lying easterly of the wall, and on the corner of Charles Street and the Western Avenue, was not included in the policy.

The plaintiffs, in order to show a notice and proof of loss, read in evidence a letter from them to the defendants' president, dated November 14th, 1842, in which the plaintiffs informed him, that it had "become necessary for the assured, under policy 8650, made by the Franklin Insurance Company, to give notice of a loss or damage to the premises insured, which happened on the evening of the 12th instant, and to request that they may be indemnified, according to the effect of that policy."

The defendants contended, that this letter alone was not sufficient proof of loss, within the meaning of the policy; but the judge ruled otherwise, and no other evidence was introduced of any notice or proof of loss having been given to the defendants, before the commencement of the action.

Other points arose on the trial, and were ruled upon, which became immaterial, in consequence of the opinion of the court, with reference to the questions above stated.

The cause was argued at the March term, 1846, by *R. Fletcher & E. D. Sohier*, for the defendants, and by *S. Bartlett & W. Sohier*, for the plaintiffs.

The opinion of the court was delivered at the same term, by

Dewey, J. To what building does this policy attach? Is it the most easterly house, situate at the corner of Charles Street and Western Avenue, or the adjoining westerly house, or both, or is the description of the building proposed to be insured, as it appears in the policy, so uncertain in its application, that for that cause the policy must fail altogether?

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In the policy itself, and on the face of it, there is nothing to create any ambiguity, as to the description of the building. But, upon proof of the circumstances, and the actual state of things, in reference to the two buildings, the ambiguity arises.

The plaintiff, however, insists, that, upon a proper reading of the description in the policy, it may well be taken to apply to the western building; and this would very clearly be so, if the words, "situate at the corner of Charles Street and the Western Avenue," are to be taken as referring to "the adjoining building" and not to the building insured.

But this, we think, cannot be maintained. The case does not seem to be one, in which any grammatical rule, referring the words "situate," &c., to the next antecedent, can properly be applied. Such a rule is not one of general application, especially to cases like the present, where the words are used in a continuous description of various distinct and independent circumstances, applicable to the building insured, and which, from their very nature, are distinct and independent descriptions. The object of each and all these different descriptions is to set forth fully all the essential circumstances relating to the property insured. Among these circumstances the most prominent is the location of the building to be insured. We might well expect, as a part of the description, contained in the policy, a statement of the location of the particular building, which was the subject of it; and, it is much more natural and probable, that the location of the building to be insured should be given, than the location of a building not insured, and which was only introduced incidentally, to disclose the manner of the connection of the building insured with an adjacent building.

We cannot doubt that a proper reading of the policy requires, that the words "situate at the corner of Charles Street and the Western Avenue" should be applied to the building insured, rather than to the adjoining building.

Having settled this point, we are then to look at the whole description, and see whether it can, upon any sound principle, apply to the western building. And in reference to this in-

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quiry, it will be seen, that the recital in the policy, as we have just held, varies from the description which would embrace the western house, in the most material particular, namely, the house insured is described as situate at the corner of Charles Street and the Western Avenue, but that is the location of the eastern house, and not of the western. That part of the description, therefore, being inappropriate, the application of the policy to the western house must be shown by other parts of the same description.

We do not doubt the propriety of rejecting a particular description, which is clearly false, in order to give effect to other descriptive words, when such words are sufficient to define the object intended to be described. In such a case, the false description may be rejected as surplusage. But the difficulty here is, that we are called upon to reject that particular part of the description, which is the most leading. Again, if we reject this description, we have no other elements of description, sufficient to embrace any particular house as within the policy. Striking out the words "situate at the corner of Charles Street and the Western Avenue," we have no locality and no particular house insured. The matter stands thus as to the western house. Rejecting this particular in the description as false, and giving full force and effect to all the other parts of it, the description is then so substantially defective, that it cannot be held to apply to the particular house, which the plaintiff insists was insured. This view of the case precludes the plaintiff from recovering damages, for any loss which he may have sustained in the destruction of the western house by fire.

It was suggested, that the policy might be construed to embrace the whole block, that is to say, the two buildings, and thus avoid the difficulty in the variance of the description as to situation. But we think that this cannot have been the true intention of the policy; the description clearly referring to one building, and that a building "connected by doors with the adjoining building."

The next inquiry is, whether this policy must totally fail

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for uncertainty in the description, or whether it may be held to attach to the eastern building, which, it was in evidence, had sustained some small damage by the fire. The fact, that the parties intended to cause a policy to be made as to one of these two buildings, will hardly be doubted; and, having decided that the western house was not covered by the policy, it might seem to result as a matter of course, that the policy attached to the eastern house. But such is not necessarily the consequence, as the description may be equally uncertain as to both. In such case, the policy must wholly fail. But the fact, that the policy was intended for the one house or the other, may have some influence; and if there be not only a preponderance of evidence, resulting from the description and the actual state of things, in favor of one building rather than the other, but sufficient evidence, after rejecting the false description, to identify the particular building, we may well conclude that such building is covered by the policy, and was designed to be so by the parties. In looking at the policy, with reference to its application to the eastern house, we find all the leading descriptions, and particularly that of location, to be directly applicable.

The only description, which is inapplicable, and which appears by the evidence not to be true, is the recital: "A cabinet maker's shop is in the building." This does not apply to the eastern house, and, if material, must of course be a fatal objection to the construction, which makes that house the subject of the policy. As before remarked, in reference to the description in the policy, as applicable to the western building, the rules of law fully authorize the rejection of any false description, if what remains be sufficient clearly to designate the object intended to be described. Now, in the present case, as to the eastern building, such will be the case, if the entire recital as to the cabinet maker's shop be rejected. There will still remain all the elements essential to a definite description, the location of the building, and every circumstance necessary to its identification.

Such being the case, and the circumstances being strong

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to show that one of those two buildings was insured; and, for the reasons already stated, the western not being described in the policy; we are of opinion, that the recital, "A cabinet maker's shop is in the building," may be rejected as erroneous; and that the policy will then attach to the eastern building.

The only other point, which, in this view of the case, is necessary to be considered, is the sufficiency of the notice of the loss and damage. The notice was in very general terms, — conveying no intelligence as to the amount of damage, — containing no statement of the particular circumstances connected with the cause of the loss, — and making no demand of any specific sum of money as an indemnity.

The sufficiency of this notice is not to be determined solely by reference to general principles applicable to other policies, but in part also upon the peculiar provisions of this policy, or the stipulations which it contains regulating this subject. The provisions relative to notice of loss are very general, and are wholly contained in the following clauses: "And in case of any loss the same is to be paid without any deduction, in ninety days after proof thereof," — "And the assured agrees, that in case of any loss, or damage, the said company shall have the right to replace the articles lost or damaged with others of the same kind and equal goodness, at any time within ninety days after notice of the loss." It would have been entirely competent for the company, to have required a distinct specification of the damages claimed by reason of the loss, or other precise and minute particulars, but they have not done so.

The first of these provisions is probably inartificially expressed to carry out the object of it, as it provides that payment shall be made in ninety days "after proof" of the loss. This was probably copied from the specifications in marine policies, where certain preliminary proofs are required.

We think, considering the general terms in which notice is required by the provisions of the policy, and applying a principle of law, which is applicable in cases of a like char-

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acter, that the notice may be regarded as sufficient. According to the principle of law referred to, when underwriters make no objection to a deficiency in the preliminary proofs, or to the notice given, but put their denial of liability upon other grounds, such conduct is a waiver of the objection of a defective notice. *Vos* v. *Robinson*, 9 Johns. 192. The principle of waiver is also recognized in the case of the *Ætna Ins. Co.* v. *Tyler*, 16 Wend. 401, where the court say: "The law is well settled in this state, that if there is a formal defect in the preliminary proofs required by the policy, and which could probably have been supplied, had any objection been made by the underwriters to the payment of the loss, on that ground; if the insurers do not call for the document, or make an objection on the ground of its imperfection, but put their refusal to pay distinctly on some other ground, the production of such further preliminary proof will be considered as waived;" good faith on the part of the underwriters requiring, in such a case, that if they mean to insist upon a mere formal defect of this kind in the preliminary proofs, they should apprize the insurer that they consider the same defective.

Cases of fire insurance seem, less than marine, to require particularity in the notice of loss. Losses by fire more usually fall under the inspection of the insurers' agents; and a general notice will be sufficient to enable the insurers seasonably to acquire a more minute knowledge of the loss, if such knowledge be desirable.

We put the decision, in the present case, however, upon the provisions of this policy, and the legal principle properly applicable to it, that no objection being taken to the form of the notice, and no further or more particular information being requested by the insurers, no objection can now be taken, upon that ground, to the plaintiff's right to recover.

The ruling, at the trial, on the first point, being now held erroneous, the verdict must be set aside, and a new trial granted.

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The case was again tried at the March term, 1846, upon substantially the same facts, before *Wilde*, J., who ruled, in conformity with the foregoing opinion, that the policy applied only to the easterly building. The plaintiff then introduced evidence, to show that the breakfast room and kitchen in the spur or L communicated with the easterly building by doors; and, upon that and other evidence in the case, contended that the spur formed a part of the eastern structure. But the judge ruled otherwise, and a verdict was taken accordingly for the injury to the easterly building only. The case being reserved for the consideration of the whole court, the rulings were confirmed, and judgment entered on the verdict, at the present term.

SUMNER WHITNEY *vs.* CHARLES GORDON.

If a tenant at will, whose rent is payable quarterly, quit the premises on a quarter day, without giving three months' previous notice of his intention, he will be liable *prima facie* for another quarter's rent; and, in an action to recover therefor, the burden of proof will be on him to show, that the landlord had waived the notice, which would be a bar to the action, or that he had resumed the possession of the premises, under an agreement which discharged the tenant from further liability for rent.

THIS action, which was tried in the court of common pleas, before *Wells*, C. J., was brought to recover one quarter's rent, for the use and occupation of certain premises, from the 25th of December, 1845, to the 25th of March, 1846.

The premises, which had been occupied by the defendant, who was a physician, consisted of a suite of apartments, which the plaintiff had been accustomed, for a long time, to let to persons of the medical profession. Some of the rooms were occupied, at the same time, by a family, who took charge of the physician's rooms; and who, during the defendant's occupation, paid him rent therefor in money and services. The defendant, previous to the commencement of the quarter in question, had occupied the premises at a rent of $325 a year,

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payable quarterly. The family above mentioned were in the rooms appropriated to them, when the defendant took possession.

At the expiration of the quarter ending December 25th, 1845, the defendant left the premises, without having given the plaintiff three months' notice of his intention. The family alluded to remained until the 25th of March, 1846; and the defendant left on the premises some articles of his furniture, with the intention of selling them to the next occupant. There was evidence tending to show, that a relative of the defendant's lodged in the premises one night after his departure; but it did not appear, that this was with the knowledge of the defendant.

It also appeared, that the plaintiff caused an advertisement, dated the 20th of December, 1845, and of which the following is a copy, to be published in a daily newspaper.

"To let, a small genteel house, situated No. 28 Winter Street, suitable for a physician or dentist, — the present occupant would like to retain the dwelling part and keep the other rooms in order as heretofore. Possession given January 1st. For particulars please inquire at the store, same building, or of Whitney & Whiston, 77 State Street. Dec. 20, e. o. p. 3 t."

The store referred to was the plaintiff's.

A witness, called by the defendant, testified, that he saw the advertisement, and that, within three weeks after the defendant left, the witness applied to the plaintiff for the purpose of hiring the premises; that, being in want of such rooms, he was then willing to take them, at the rent for which they had been let to the defendant, namely, $325 a year; but that, on being informed that the rent demanded was $350, he declined taking them.

The defendant contended, that the demand of a higher rent than the defendant had paid, taken in connection with the advertisement, was, in the absence of an express authority from the defendant to make such a demand, conclusive evidence that the plaintiff had resumed possession of the premises, and was dealing with the same on his own behalf.

The plaintiff contended, that it was open to the jury to infer, from all the evidence in the case, that the plaintiff was

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acting as the agent of the defendant, in letting the premises; or, that it had been agreed between the parties, that the plaintiff should allow the defendant for whatever rent he might obtain for the occupation of the premises between December 25th, 1845, and March 25th, 1846.

The court instructed the jury, that in consequence of the neglect of the defendant to give the plaintiff notice of his intention to quit, the entire occupation of a part of the premises by the defendant's tenant, and other circumstances of a partial occupation of the residue, during the period for which the rent was demanded in this action, it became incumbent on the defendant to satisfy the jury, that an agreement had been made between him and the plaintiff, by which the defendant resumed possession of the premises, and discharged the defendant from any further obligation to pay rent; and that the evidence introduced by the defendant had a tendency to prove such agreement, but that it would not, if believed, legally bar the plaintiff from maintaining the present action.

The jury returned a verdict for the plaintiff, and the defendant excepted.

J. C. Adams, for the defendant.

J. C. Park, for the plaintiff.

Shaw, C. J. This action was brought for a quarter's rent of premises formerly occupied by the defendant, and hired of the plaintiff, the defendant being tenant at will, and the rent payable quarterly. It is stated, in the case, that the quarter terminated on the 25th of December, 1845, to which day the rent was paid; and that the defendant then left the premises without having given the plaintiff three months' notice of his intention to quit. By the Rev. Sts. *c.* 60, § 26, a tenancy at will can only be determined by three months' notice; except in cases, where there is a failure to pay the rent, or, where, by agreement, the rent is payable at intervals of less than three months. The defendant, in this case, not having given the notice required by law, was liable *prima facie* for the quarter's rent sued for. The defence was, that the plaintiff had waived the three months' notice, and had accepted

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a surrender of the premises. In regard to this point, evidence was introduced on both sides, as stated in the bill of exceptions.

The jury were instructed, that the want of notice by the defendant, and the entire occupation of a part of the premises by his tenant, and other circumstances of a partial occupation of the rest, during the period for which the rent was demanded, rendered it incumbent on the defendant to satisfy the jury, that an agreement had been made between him and the plaintiff, by which the plaintiff resumed possession of the premises, and discharged the defendant from any further obligation to pay rent. We think the instruction was correct, in stating that the defendant, having left without three months' notice, the burden of proof was on him to show, that the plaintiff had waived notice and resumed possession; and the fact that the defendant had left, and that the plaintiff had waived notice and resumed possession, would, in effect, amount to an agreement. But the assumption, that a part of the premises had been entirely occupied by the defendant's tenant, and that he had himself partially occupied the residue, during the quarter for which rent was claimed, seems to have been an assumption contrary to the evidence; or, at least, the evidence of the facts, so assumed, if material, should have been left to the jury. The announcement in the plaintiff's advertisement, that the occupant would like to continue, and make an arrangement with the incoming tenant, if one should offer, is evidence tending to show that such occupant continued there with the plaintiff's consent, and was therefore rather his tenant than the defendant's. So, as to the assumption, that the residue was partially occupied by the defendant; it must depend upon the proof, either that a relative of the defendant's lodged there, or that articles of furniture, likely to be useful to a physician, remained there. As to the former, it is expressly found, that it was not done with the knowledge and consent of the defendant, and was therefore the act of a mere stranger, which could not affect the defendant. As to the furniture, it might be useful to the defendant to leave it

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there, in order to sell it to the incoming tenant; and it might also be useful to the plaintiff, by attracting professional men to hire the premises. If material, these facts should have been left to the jury. We have already said, that, as to the burden of proof, the facts alluded to were not necessary to the decision; but, in regard to their bearing upon other parts of the case, the assumption of their truth, without submitting them to the jury, may have had a tendency to mislead.

The other part of the instruction was, that the evidence introduced by the defendant had a tendency to prove an agreement, on the part of the plaintiff, to waive notice and resume the possession; but that, if believed, it would not legally bar the plaintiff from maintaining the present action. We are of opinion, that this direction was not correct. The evidence, tending to prove the fact of a waiver of notice, if believed by the jury, and not controlled by other evidence, established a fact, which would be a bar to the action.

The meaning of the learned judge, who tried the cause, may, perhaps, be thus explained. The counsel for the defendant had insisted, that the advertisement, the demand of a higher rent, and the other circumstances in evidence, were conclusive evidence that the plaintiff had resumed the possession. The judge may have intended to instruct the jury, that this evidence, if believed, did not, of itself, and without the inference, to be drawn by them therefrom, of a waiver of notice and resumption of possession, operate as a legal bar to the suit. But if such were his meaning, we think it was not so understood by the jury. We are of opinion, further, that he should have submitted the evidence to the jury, with instructions, that it was a question of fact for them to decide, whether the plaintiff had waived notice and resumed possession; that the facts proved did not constitute a legal bar to the action; but if, upon all the evidence, the jury believed that the defendant had waived notice, and consented to resume possession of the premises, notwithstanding the want of notice, the action would be barred thereby; otherwise that the plaintiff, on the *prima facie* case, would

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be entitled to recover. The exceptions are sustained, and a new trial ordered in the court of common pleas.

MOSES DORR *vs.* WALDO A. FISHER.

Where an article is sold, with a warranty, or a representation amounting to a warranty, as to its quality; and, in an action by the seller to recover the price, the buyer relies upon a breach of the warranty, or the falsity of the representation, to reduce the amount of his liability; the burden of proof is on him to show, that the quality of the article does not correspond with the warranty or representation.

THIS action, which was brought to recover the price of two tubs of butter, came before the court on exceptions (only one of which was now insisted on), taken by the defendant to the rulings of *Colby*, J., before whom the cause was tried in the court of common pleas.

The plaintiff having been allowed, against objection on the part of the defendant, to prove his claim as a book account, the defendant then introduced evidence, from which the following facts appeared. In November, 1845, the plaintiff offered several kegs of butter to the defendant for sale. On examining the butter (two or three kegs only), the defendant told the plaintiff that he had been smoking, and was therefore unable to decide whether it was good or not, but that he wanted it of a first rate quality. The plaintiff then said, that he called the butter first rate, and the defendant replied, that if it was good, the plaintiff might leave him two tubs. The two tubs were left, in the course of the day, at the defendant's store, where they remained for about a week, when the plaintiff came to the store, and some conversation ensued relative to the butter. The plaintiff was there again some time afterwards (the witnesses did not state when or how long afterwards), and requested that the butter should be put into the cellar.

The principal question was, whether the butter was of a good quality, and much evidence upon this point was introduced on both sides.

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The defendant contended, that the butter was sold under a warranty that it was of the best quality, and that the burden of proof was on the plaintiff to prove that it was of such a quality. But the presiding judge instructed the jury, that if the butter were sold with a warranty as to quality, or with a representation amounting to a warranty, the burden of proof was on the defendant to show, that it was not equal to the warranty or representation. The jury returned a verdict against the defendant, who thereupon filed exceptions.

T. Wentworth, for the defendant.

T. Willey, for the plaintiff.

Shaw, C. J. This cause has been argued, on the part of the defendant, as if the suit were brought upon an open, unexecuted contract for the purchase of goods; whereas the declaration is in indebitatus assumpsit for goods sold and delivered. To maintain this action, it is not necessary to set out the contract of sale, with its conditions and limitations; it is enough to prove an agreement for a sale of the goods, at a fixed price in money, or without a price, (in which case, the law implies an agreement to pay so much as they are worth,) and an actual delivery, whereby a debt arises. A delivery by the vendor implies an acceptance by the vendee. An offer, by the vendor, not accepted by the vendee, may be a good tender, and a good performance on his part, but it is not a delivery. If there are conditions annexed to the agreement of sale, respecting the quality, or other circumstances, which are not complied with by the vendor, the vendee should decline to accept the goods; but, if he does accept them, the acceptance is a waiver. And, so, in an indebitatus assumpsit, for goods sold and delivered, the plaintiff must prove a delivery, or he will fail in the action. And this is not confined to the case of an implied assumpsit, on a *quantum valebat;* if the sale be made by an express contract, not under seal, and the goods are actually delivered, it is sufficient to allege that the defendant is indebted to the plaintiff for goods sold and delivered, and the law implies a promise to pay. No matter, therefore, what may have been the terms and con-

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ditions, under which goods are sold and delivered; if nothing remain but the obligation to pay for them, this is a debt, the existence of which supports the allegation of being indebted, and supersedes the necessity of setting out specially such terms and conditions.

"Where goods have been sold and actually delivered to the defendant, though under a special agreement, it is in general sufficient to declare on the indebitatus count, provided the contract were to pay in money, and the credit be expired." 1 Chit. Plead. 338.

This is not a mere technical rule of pleading, but a sound rule of law and justice, growing out of the nature of a sale. Were it otherwise, and were the plaintiff, after a delivery of goods on a contract of sale, bound to prove the terms and conditions of such sale, and to prove affirmatively that he had complied with those conditions, on his part, the result would be, that the vendee, having accepted the goods, as and for the goods contracted for, and without offering to return them, or giving notice to the vendor, to come and take them back, might hold and retain the goods, without paying any thing for them. The vendor could not recover them back in an action, because he has delivered them to the vendee, in pursuance of a contract, as his own.

It is asked, then, has the vendee no remedy against the vendor, after delivery, if the vendee fails to derive the benefits, expected and stipulated for on the sale? Certainly not. If he has been deceived, as to the title, quality, or character of the thing purchased, he may rescind the contract, restore or tender back the goods, and recover back the purchase money; or he may be secured by a warranty on the sale. The law, on the sale of personal property, implies a warranty of good title, so that if the vendee be deprived of his purchase by a paramount title, he has a remedy on his warranty. Or he may take an express warranty, as to the quality, condition, value, age, origin, or other circumstances respecting the thing sold. But a warranty is a separate, independent, collateral stipulation, on the part of the vendor, with the vendee, for which

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the sale is the consideration, for the existence or truth of some fact, relating to the thing sold. It is not strictly a condition, for it neither suspends nor defeats the completion of the sale, the vesting of the thing sold in the vendee, nor the right to the purchase money in the vendor. And, notwithstanding such warranty, or any breach of it, the vendee may hold the goods, and have a remedy for his damages by action.

But, to avoid circuity of action, a warranty may be treated as a condition subsequent, at the election of the vendee, who may, upon a breach thereof, rescind the contract, and recover back the amount of his purchase money, as in case of fraud. But, if he does this, he must first return the property sold, or do every thing in his power requisite to a complete restoration of the property to the vendor, and, without this, he cannot recover. *Conner* v. *Henderson*, 15 Mass. 319; *Kimball* v. *Cunningham*, 4 Mass. 502; *Perley* v. *Balch*, 23 Pick. 283. Such a restoration of the goods, and of all other benefits derived from the sale, is a direct condition, without a compliance with which, the vendee cannot rescind the contract, and recover back the money or other property, paid or delivered on the contract.

But his other remedy is by an action on the warranty, or contract of the vendor, on which, if there be a breach, he will recover damages to the amount of the loss sustained by the breach, whatever that may be. If it be a warranty of the quality of goods, and the breach alleged is, that the goods delivered were inferior to the goods stipulated for, the damage will ordinarily be the difference in value between the one and the other. Such an action affirms instead of disaffirming the contract of sale, leaves the property in the vendee, and gives damages for the breach of such separate, collateral contract of warranty.

This remedy is so familiar, that it scarcely requires to be supported and explained by authorities. But it naturally requires an action to be brought by the vendee against the vendor, which, if the vendor is at the same time suing for the price, is a cross action.

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But the general tendency of modern judicial decisions has been, to avoid circuity and multiplicity of actions, by allowing matters growing out of the same transaction to be given in evidence by way of defence, instead of requiring a cross action, when it can be done without a violation of principle, or great inconvenience in practice.

And it has lately been decided, in this court, after consideration and upon a review of the authorities, that, when a cross action will lie for a deceit in the sale of a chattel, the deceit may be given in evidence in reduction of the damages, in a suit for the purchase money. *Harrington* v. *Stratton*, 22 Pick. 510. And the principles, which govern that case, are precisely applicable to the case, where a cross action will lie to recover damages on a breach of warranty on a sale, and the same may be given in evidence, and a like amount deducted from the purchase money, in assessing damages in a suit by the vendor for the price. *Poulton* v. *Lattimore*, 9 B. & Cr. 259; *Perley* v. *Balch*, 23 Pick. 283.

It appears by the report in the present case, that these are the principles on which the trial of the action proceeded. The plaintiff must first have proved a sale and delivery of the two tubs of butter. Some objection was made to the plaintiff's account book; but it was not alluded to in the argument. Indeed, the other proof tends to show, that the defendant agreed to take the two tubs of butter, and directed the plaintiff to leave them at his store, which the plaintiff did the same day. No offer was made afterwards to return the butter. No notice was given to the defendant to take it away. This was evidence, from which a jury might well infer a sale and delivery. The only way, then, in which the defendant could avail himself of proof of warranty of quality, and a breach of it, was in obtaining a reduction of damages, by way of set-off, in nature of a cross action, and as a substitute therefor. Had the defendant brought his action, it is quite clear, that the burden of proof would have been on him to prove such warranty and breach, and the damage sustained by it. The burden was on him in the same manner, when

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he resorted to this line of defence, as a substitute for a cross action. We are of opinion, therefore, that the direction of the judge was strictly correct, that if the article was sold to the defendant with a warranty as to its quality, or with a representation amounting to a warranty, the burden of proof was on the defendant, to show that it was not equal to the warranty.

Exceptions overruled and judgment on the verdict.

OTIS DRURY & another *vs.* ALEXANDER VANNEVAR.

The attestation of a note, within the Rev. Sts. c. 120, § 4, must be made with the knowledge of the promisor, and as a part of the same transaction with the making of the note; and whether it is so made is a question of fact for the jury, as to which the burden of proof is on the promisee.

IN this action, which was brought to recover the amount due on a promissory note, given by the defendant to the plaintiff, dated January 31, 1835, and purporting to be witnessed, the defendant relied on the statute of limitations, Rev. Sts. c. 120, § 1, in defence, and the question was, whether the note was "signed in the presence of an attesting witness," within the fourth section of the same chapter.

At the trial, which was in the court of common pleas, before *Colby*, J., the plaintiff called the subscribing witness, who testified that he was clerk of the plaintiff from 1832 to 1836; that he was called into the counting room for the purpose, and was present when the defendant signed the note, and saw him sign it; that the witness attested immediately by the direction of one of the plaintiffs, in presence of the defendant, and within three or four feet of him, whilst the note was lying on the desk where it was signed, but he could not state whether or not the defendant knew that the note was so attested; that the witness had attested many notes, and there was nothing unusual on the present occasion; that one of the plaintiffs directed the attestation, whilst

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he was standing on the opposite side of the desk on which it was signed, and spoke as loud as usual.

The plaintiff requested the judge to instruct the jury, that if they found "that the note was witnessed, at the time, in the presence of the defendant, in the manner, and under the circumstances testified to by the witness, and the defendant had an opportunity of seeing or knowing the fact, it would be immaterial whether the defendant actually saw or knew of the attestation or not; and, if such knowledge were material, there being no evidence to the contrary, the law would presume that the defendant saw or knew that it was attested."

The judge declined so to instruct the jury, but instructed them, "that the burden of proof was on the plaintiffs, to show that the note was attested in the presence, and with the knowledge of the promisor."

The jury returned a verdict for the defendant, and the plaintiffs filed exceptions.

D. A. Simmons, for the plaintiffs.

G. W. Cooley & E. F. Hodges, for the defendant.

Shaw, C. J. The judge, before whom the trial took place, was correct in declining to instruct the jury, as requested by the plaintiffs, that it was a presumption of law from the facts in evidence, that the defendant saw or knew of the attestation. Whether the defendant saw or knew of the attestation was a question of fact, which it was for the jury to decide, upon the evidence before them; and there was evidence in the case sufficient for the jury to act upon, and from which they would have been authorized to infer the fact of knowledge. In order to constitute an attestation of a note, within the statute, the witness must put his name to it openly, and under circumstances which reasonably indicate, that his signature is with the knowledge of the promisor, and is a part of the same transaction with the making of the note. The judge was also correct in saying, that the burden of proof was on the plaintiffs, to show that the note was properly attested; but taking the instructions prayed for in connection with that which was given, we think the jury were left to

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infer, or that they might have thought themselves at liberty to infer, that the defendant's knowledge could only be proved by positive evidence, instead of being an inference of fact, which they were authorized to make from the facts in evidence. The instructions not being sufficiently clear in this particular, the exceptions are sustained, the verdict set aside, and a new trial ordered in this court.

BENJAMIN LYON *vs.* DANIEL J. COBURN.

The provision of the Rev. Sts. *c.* 90, § 78, authorizing the attachment and holding of personal property, subject to any mortgage, pledge, or lien, does not authorize the seizing of such property on execution.

IN this case, which was an action of replevin, tried in the court of common pleas, before *Colby*, J., it appeared, that, on the 26th of February, 1846, Sarah L. Hawes, being the owner of the property replevied, made a mortgage thereof, with other property, to the plaintiff, to secure the payment of a debt on demand; that, on the 19th of June following, the mortgage still subsisting, the defendant, a deputy sheriff, seized the mortgaged property on an execution against the mortgagor; and that, on the 27th of the same month, the plaintiff sued out his writ of replevin.

The presiding judge ruled, *pro forma*, that the action could not be maintained; and a verdict being taken accordingly for the defendant, the plaintiff excepted.

M. S. Clarke, for the plaintiff.

There was no appearance for the defendant.

BY THE COURT. The only question is, whether personal property of a debtor, which is subject to any mortgage, pledge, or lien, and of which the debtor has the right of redemption, may be taken by an officer on execution, and sold for the satisfaction thereof, in the same manner that it may be attached on mesne process, pursuant to Rev. Sts.

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c. 90, § 78. The court are of opinion, that such property is not liable to be seized or taken on execution.

This, we believe, is the first time the question has been distinctly presented, and there are no adjudications on the subject. The language of the statute is appropriate to an attachment on mesne process, but not to a seizure or taking on execution. The language of the *St.* 1829, *c.* 124, § 2, was broader, and made it lawful to attach or take in execution such property. But the latter provision is omitted in the revised statutes, the language and provisions of which are particularly adapted to the case of attachment on mesne process. This is strengthened by the additional acts of 1843, *c.* 72, § 3, and 1844, *c.* 148. The directions and provisions of these clearly assume, that the attachment is on a writ, in a suit pending in court, and obviously refer to an attachment on mesne process alone.

But a creditor, in such case, is not without remedy. The case supposes, that he has obtained judgment, but has no property attached to satisfy his execution. In that case, he may have an action of debt on his judgment, and may attach mortgaged property under the statute cited, Rev. Sts. *c.* 90, § 78; or he may have a trustee process, and summon the mortgagee, as trustee, by Rev. Sts. *c.* 109, § 25.

Exceptions sustained, verdict for the defendant set aside, and a new trial granted.

JEREMIAH LORD *vs.* SEWALL F. BELKNAP.

An agreement was entered into, July 2d, 1841, between B. and C., by which it was agreed, that C. should construct and finish, in a specified manner, and to the acceptance of the engineers, on or before June 1st, 1842, a certain section of the P. S. & P. Railroad; that if the work should not be done within the time fixed, B. should assess such damage for the delay as he should think just and reasonable, and charge C. with the amount; that if it should at any time appear to B. or the engineers, that C. was not proceeding with sufficient speed, they might determine that the contract had been abandoned by C., in which case, the agreement on the part of B. should become null and void, and any balance which might otherwise be due to C. should be forfeited to B., who might thereupon con

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tract with others to finish the road; that if C. should not well and truly perform the agreement on his part, B. might dismiss him from the work, in which event, a like forfeiture should be incurred; that, in consideration of the fulfilment by C. of the agreement on his part, B. should pay him, for his labor, at the rates specified in the agreement, in monthly payments of three fourths of the amount of the work done, to be estimated by the engineer; and that when the whole section should be accepted, as completed agreeably to the contract, the balance should forthwith be paid to C.: On the 27th of December, 1841, C. drew an order in favor of L. on B., for $100, which B. accepted "to pay when due according to C.'s contract:" On or about the 1st of June, 1842, the contract was abandoned by C., either voluntarily, or by a dismissal according to its terms. In an action by the payee against the acceptor, to recover the amount of the order, it was held:

1. That the final payment was dependent, and could only be demanded upon the completion of the work:
2. That the monthly payments were independent, and became due at the end of each month:
3. That, if, at any time between the acceptance of the order and the abandonment of the work, the amount of the order was due on any monthly payment, the defendant became bound to pay according to the terms of the acceptance:
4. That, if the legal consequence of a dismissal or abandonment were a forfeiture of the balance due at the time to C., (of which the court gave no opinion,) such balance would not include money actually paid to C., according to the terms of the contract, or at C.'s request promised to be paid to another, without reference to such possible forfeiture.

THIS action was brought by the plaintiff, as the payee, against the defendant, as the acceptor, of an order drawn on him by Patrick Calpin, of which the following is a copy:

"$100. North Berwick, December 27th, 1841. S. F. Belknap, — Sir Please pay the bearer, Jeremiah Lord, of North Berwick, one hundred dollars, and charge the same to my account. Patrick Calpin. [Indorsed] Accepted to pay the within when due according to P. Calpin's contract. S. F. Belknap, by Benj. S. Newhall. Dec. 28, 1841."

It appeared, on the trial, which took place before *Wells*, C. J., in the court of common pleas, that, by articles of agreement, dated July 2d, 1841, it was agreed between the defendant, under the name of S. F. Belknap and company, and Calpin, the drawer of the order, that the latter, in consideration of the payments and covenants, to be made and performed by the former, should construct and finish, according to the descriptions and specifications contained and referred to in the agreement, a certain section of the Portland, Saco & Portsmouth Railroad, in the most substantial manner, in every respect, and to the satisfaction and acceptance of the resident engineers of the road.

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The agreement contained also the following clauses:

"And the said section of the road shall be made and completed, as herein described, on or before the first day of June, 1842, and for a failure to make and complete the said section of road within the time fixed for its completion, said B. & Co. shall assess such damage as they may think just and reasonable, and charge said P. C. with the amount thereof, and the said B. & Co. may employ other help to hasten the completion of the work, within the said specified time, and the expense of such help shall be paid by the said C.

"And, in case it should appear to said engineers, or to said B. & Co., that the work has not proceeded or gone on with sufficient speed, they shall have power to determine that this contract has been abandoned, and, in the event of said determination, this agreement on the part of said B. & Co. shall become null and void, and any balance of money due shall be forfeited by said C. to said B. & Co., and the said B. & Co. shall have full right to contract with any person or persons in the stead of the said P. C., &c., for the completion of the said work, &c."

"In consideration of the fulfilment, by the said P. C., of the foregoing provisions of this contract, the said B. & Co. do hereby promise and agree, for doing and performing the work as aforesaid, to pay or cause to be paid to the said P. C., his, &c., for every cubic yard of earth, &c., in monthly payments of three fourths of the amount of the engineer's estimate of work done.

"Provided always that said engineer shall decide on the quantity and quality of the excavation, and that his decision shall be final and conclusive. And when the whole of the section hereby contracted for shall have been accepted as completed agreeably to contract, the balance due shall forthwith be paid to the said C., his, &c. And the decision of said engineer, upon the admeasurement of the work to be executed under this contract, shall be conclusive. And it is hereby further agreed, that if the said P. C. shall not, on his part, well and truly perform all the covenants herein contained, said B. & Co. may dismiss him from the work, and then and in that event, this contract shall become null and void, and any balance for work done on said road, which would have been due to said P. C., shall be forfeited and become the right and property of the said B. & Co."

The plaintiff admitted, that the contract had been abandoned by Calpin, either voluntarily, or by a dismissal under the terms of the contract, on or about the first day of June, 1842, and that the work remaining unfinished had been performed by the defendant.

The plaintiff then offered further evidence, which was objected to by the defendant, on the ground, that no action would lie against him under and by the terms of the contract, until the final completion of the same by Calpin, and consequently, that nothing was due on the acceptance according to its terms.

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But the court decided, that further evidence was admissible, and that the defendant would be liable on the acceptance, provided the plaintiff could satisfy the jury, that a sufficient amount of funds, payable from the three quarters advanced payments provided for by the contract upon the engineer's estimates, over and above other liabilities assumed to be paid by the defendant, previous to the acceptance of the order, was, at any monthly settlement between the date of the acceptance and the time of the abandonment of the contract by Calpin, in the hands of the defendant, unless the defendant could satisfy the jury, that the damage sustained by the abandonment exceeded the one quarter reserved by the terms of the contract.

The evidence, offered by the plaintiff, was thereupon admitted; and a verdict being rendered in his favor, the defendant filed exceptions.

T. B. Pope, for the defendant.

F. B. Hayes, for the plaintiff.

Shaw, C. J. The plaintiff sues as the payee of an order for money, not negotiable, drawn by Patrick Calpin on the defendant, and specially or conditionally accepted by him. The order being general, the liability of the defendant depends upon the terms of his acceptance. He accepts, to pay the amount drawn for, $100, when due according to Patrick Calpin's contract. On reference to the contract, it appears to be an agreement by the drawer of the order, Patrick Calpin, to do the grading on a section of the Portland, Saco & Portsmouth Railroad, in the manner, and upon the terms, therein specified.

The contract, which was made in July, 1841, was, to complete the work by the first day of the ensuing month of June. Belknap stipulated, in consideration of the fulfilment, &c., to pay to Calpin three quarters of the estimated amount of the work, as it should be done, in monthly payments; and when the whole of the section contracted for should have been accepted, as completed agreeably to the contract, the balance due should be forthwith paid to Calpin. It is further pro-

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vided, that if, in the opinion of the engineer, the work should not proceed speedily enough, Belknap and company reserved a right to determine that the contract had been abandoned; in which case, the agreement should become null and void, and any balance of money due should be forfeited by Calpin to Belknap and company. So, in another part of the contract, it is stipulated, that if Calpin shall not well and truly perform all the covenants, &c., Belknap and company may dismiss him from the work, and then the contract shall become null and void, and any balance for work done, which would have been due to Calpin, shall be forfeited and become the right and property of Belknap and company.

It may be remarked, in passing, that this contract appears to have been made and executed by Belknap alone, but in behalf of himself and some other person or persons.

These are the parts of the contract, which bear upon the question of the defendant's liability on his qualified acceptance.

It was conceded by the plaintiff, that the contract had been abandoned by Calpin, either voluntarily, or by dismission under the terms of the contract, on or about the first of June, 1842, and that the unfinished work had been performed by the defendant.

By the defendant's qualified acceptance, he undertook to pay the plaintiff the $100, when due according to Calpin's contract. The defendant, upon the evidence, contended that by the terms of the contract, nothing was due to Calpin, until the final completion of the same, and that nothing was due to the plaintiff upon the acceptance, according to the terms of the contract.

The chief justice of the court of common pleas decided otherwise, and instructed the jury, that the defendant was liable upon his acceptance, if it should be proved to the jury, that a sufficient amount of funds, payable from the three quarters advanced payments, provided for in the contract, over and above other liabilities assumed to be paid by Belknap, previous to the acceptance of the order, at any

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monthly settlement between the date of the acceptance and the time of the abandonment, was in the defendant's hands, unless the defendant could satisfy the jury, that the damage, sustained by reason of the abandonment of the contract, exceeded the one quarter reserved by its terms.

The court are of opinion, that this direction was sufficiently favorable to the defendant; and it may be doubtful, whether the last clause is not too much so, if, as we suppose, it referred to a damage occasioned by an abandonment after such quarterly payment became due.

The stipulation for the final payment was dependent, and could only be claimed after a completion of the work; but we think the monthly payments were independent.

Whether mutual stipulations are dependent and conditional, or independent, is sometimes a difficult question. But, where time is given for performance on one side, and payments are to be made on the other within such time, it is certain that the making of payments cannot depend upon a full and complete performance. Such were the terms of the contract; it was to be completed in June, and monthly payments of three quarters made in the mean time. The acceptance was given in December. If any work was done between that time and that when the abandonment took place, three quarters of the amount of the pay for such work became due and payable. We think, therefore, that the jury were rightly instructed, that, if, on any such monthly payment, there was $100 due, the defendant became bound to pay the plaintiff by the terms of his acceptance.

The evidence being properly left to the jury, upon a direction, which was right in point of law, the verdict for the plaintiff establishes the fact, that the amount stated was due by the contract, upon the stipulated monthly payments.

But it has been contended, that, by the terms of this contract, the subsequent abandonment of the work, or dismission of the contractor, operated as a forfeiture, not only of the one quarter part reserved to the final completion, but also of any unpaid balance due on the anterior monthly payments.

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Certainly, a contract like this, providing for a dissolution and forfeiture, at the election of one party, is to be construed strictly, against such forfeiture. Penalties and forfeitures are not to be favored in law, or tolerated in equity.

But supposing, that, by the terms of the contract, on such dismissal, any balance, which would have been due to Calpin should be forfeited and become the property of Belknap, such balance would not include money actually paid, according to the terms of the contract, or at Calpin's request stipulated to be paid to another person, without regard to such possible forfeiture.

Besides, by the terms of the defendant's acceptance of Calpin's order, he became liable to pay the amount to the plaintiff, when so much should be due in cash upon any monthly payment. When that event happened, the plaintiff's right became complete and vested, and could not be affected by any subsequent default of Calpin. We think the directions were right.

Exceptions overruled.

WILLIAM UNDERWOOD *vs.* ANDREW CARNEY & another.
SAME *vs.* THOMAS WIGGLESWORTH.

Where the grantor of land conveyed to the grantee "the right of passing and repassing, draining, and all the usual easements," in and upon other land of the grantor, the easements thus created became appurtenant to the estate conveyed, and susceptible of conveyance to subsequent purchasers, as appurtenances, without express words.

A right of way, appurtenant to land, is appurtenant to the whole and to every part of it; and, if such land be divided, and conveyed in separate parcels, a right of way thereby passes to each of the grantees.

J. C., being the owner of land on the easterly side of Morton Place, a court or passage way in the city of Boston, and also of the fee of Morton Place, conveyed a portion of the land to the plaintiff, "with the privilege of using said court or passage way, which, with the sidewalk, is about thirty feet in width, for the purpose of a passage way, in common with all other persons, whose estates are bounded thereby or communicate therewith:" J. C. subsequently conveyed the fee of Morton Place to R. and A., who were the owners of land on the westerly side thereof: R. and A. conveyed portions of the land to the defendants, "with the right of passing and repassing, draining, and all the usual easements on said

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Underwood v. Carney & another.

Morton Place, not inconsistent with those of the easterly abutters: " The defendants subsequently erected on their own land, but on the line of Morton Place, warehouses with doors and windows opening upon Morton Place, and shutters projecting into the same, when open, and with sidewalks therein, having on their surface iron gratings for the admission of light to, and trap doors for communicating with, the underground apartments of the warehouses: In actions on the case, for obstructing the plaintiff's right of way by such erections, it was held, that the parties must be presumed to be acquainted with the usages of the place, and to have created the easement with reference thereto; that the defendants had a right to make a reasonable use of the way in Morton Place adjoining their land; that the use, which other persons, similarly situated, made of their land, was evidence of what was such reasonable use; and that, in erecting the structures complained of, it did not appear, that the defendants had made any use of Morton Place, or had done any acts on their lands adjoining thereto, which were not justified by a common and well established usage in the city of Boston.

These were actions on the case, for an alleged obstruction, by the defendants, of the plaintiff's enjoyment of a right of way in a passage or court called Morton Place, which the plaintiff claimed as appurtenant to his dwelling-house.

The declaration, in each case, set forth the unlawful erection of warehouses, the windows, shutters, and doors of which opened upon and swung over, and the eaves of which projected into, the passage or court known as Morton Place; that the defendants had excavated parts of the same, and had placed upon and around such excavations large quantities of iron and stone; that they had placed upon other parts of the passage large quantities of earth, bricks and stones, and had erected a sidewalk thereon; and that they had raised and elevated parts of the passage, so that the same was obstructed, and the flow of the water from the surface thereof impeded, and directed into and upon the plaintiff's foundation and cellar.

The cases were tried in this court before *Wilde*, J., from whose report thereof, accompanied by plans and deeds exhibited by the parties, the following facts appeared.

The plaintiff's dwelling-house was on the easterly, and the erections and obstructions complained of on the westerly, side of Morton Place.

The defendants had erected warehouses on lands belonging to them, on the westerly side of Morton Place, with a sidewalk in front containing trap doors, and gratings, for

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communicating with and admitting light to apartments under ground, and with doors and shutters, projecting, when opened, over the line of the passage way.

Several witnesses, called by the plaintiff, who were occupiers of houses on the easterly side of Morton Place, testified, that, in their judgment, the narrowing of the court, by the erection of the sidewalk; — the leaving of the iron shutters partly open, which frequently occurred; — the keeping open of the trap door, in the sidewalk of one of the defendants, which was the case from a third to a half of each day, for the purpose of putting in and taking out goods; — the peril in the night time from a break in the sidewalk owing to an increase of its width opposite the building of one of the defendants; — and the unpleasantness, to females and others, of that part of the sidewalk, which consisted of iron gratings for the admission of light; — were an injury to the plaintiff's estate.

The plaintiff derived the title of his estate, to which he claimed the right of way in question as appurtenant, from Jonathan Cogswell, under a deed bearing date July 24th, 1835; at which time, Cogswell was the owner of the estate which he then conveyed to the plaintiff, and was also seized in fee of the court or passage known as Morton Place.

The deed of Cogswell to the plaintiff described the house and land thereby conveyed as being numbered five on a plan of Morton Place, and granted and conveyed to the plaintiff an easement in Morton Place, in the following terms: "the privilege of using said court or passage way, called Morton Place, which, with the sidewalk, is about thirty feet in width, for the purpose of a passage way, in common with all other persons, whose estates are bounded thereby, or communicate therewith, so, however, as not to hinder or prevent me the said Cogswell, or my heirs or assigns, from erecting and maintaining a fence or wall on the westerly side of said passage way, in case I or they choose to do so, at any time, if, by the erection of such fence or wall, the width of said court shall not be reduced more than eighteen inches, which

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reservation is made to enable me, my heirs and assigns, to hinder and debar the owners, tenants and occupants of the land adjoining said court, on the westerly side thereof, from using said court, or having any communication therewith, except by my or their permission and consent."

The estates of the defendants are situated on the westerly side of Morton Place, and are parts of what was known as the Bowdoin estate, the defendant Wigglesworth being the owner of one lot, and the other defendants of three lots.

At the date of the deed of Cogswell to the plaintiff, Cogswell was seized in fee of Morton Place; and his estate therein, subject to the easements created by his deed to the plaintiff, subsequently passed by mesne conveyances, and, in April, 1836, vested in Russell and Amory; who were also at the same time the owners of the Bowdoin estate, including the land, of which the defendants subsequently became the purchasers. In October, 1836, Russell and Amory conveyed the Bowdoin estate to Henry Rice, in fee, by a deed which contained the following clause: "And also conveying to said Rice, his heirs and assigns, the right of passing and repassing, draining, and all the usual easements on said Morton Place, not inconsistent with those of the easterly abutters." In June, 1841, Rice conveyed the estate, with the exception of a part previously conveyed to John Davenport, to Thomas Searle. The deed to Searle conveyed the right of passing, repassing, &c., in Morton Place, in the terms of the deed from Russell and Amory to Rice. The estate of Searle, which consisted of an equity of redemption, was sold on execution, in March, 1843, by Watson Freeman, a deputy sheriff, to George Wildes, including "the right of passing, repassing and draining, and all the usual easements on said Morton Place, not inconsistent with those enjoyed by the easterly abutters." The estate, or a portion thereof, was conveyed by Wildes, December 29th, 1843, to Griffin, who subsequently conveyed portions or lots thereof to the several defendants; but in none of these last mentioned conveyances was there any grant or mention of a right of way in Morton Place.

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The judge, before whom the trial took place, being of opinion, that the defendants had a right, under their deeds, to erect the structures complained of, in the manner already described, verdicts were thereupon entered, by consent, for the defendants, subject to the opinion of the whole court. If, in the opinion of the court, the defendants had the right in question, judgments are to be rendered on the verdicts; otherwise new trials are to be ordered.

S. Bartlett, for the plaintiff.

C. G. & C. W. Loring, for the defendants.

Forbes, J. These cases depend substantially upon the same state of facts, upon which two questions arise: first, whether the defendants have a right of passage or way in Morton Place; and, second, if they are entitled to such an easement, whether they have been guilty of such changes, alterations, or abuses of the right, as will enable the plaintiff to maintain actions against them.

1. The first question is, whether the defendants are the owners of a right of way in Morton Place. The estate of the plaintiff is situated on the easterly side of Morton Place, and he derives his title from Jonathan Cogswell, under a deed bearing date July 24th, 1835, some of the provisions of which require a particular consideration. The estates of the defendants are situated on the westerly side of Morton Place, and are parts of what is known as the Bowdoin estate.

[Here the judge recapitulated the conveyances as already stated on pages 287 and 288.]

Russell and Amory, thus being the owners of the fee in Morton Place, had the power of appropriating it to such uses, and of subjecting it to such easements and servitudes, as they saw fit, not inconsistent with the rights of the plaintiff. Being also the owners of the adjoining land, denominated the Bowdoin estate, it was equally in their power to annex the easements, which they might thus create, to the Bowdoin estate, and to convey the same therewith.

In the opinion of the court, the effect of the conveyances, above enumerated, of the Bowdoin estate, from Russell and

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Amory and their grantees, was to annex the easements in Morton Place to the estates thereby conveyed; and that such easements passed as appurtenances to subsequent purchasers, among whom were the defendants, although the easements were not expressly mentioned in their deeds. *Kent* v. *Waite*, 10 Pick. 138.

But it was contended, that, in case these easements should be held to be appurtenant to the whole estate, yet, that they were lost by a division of the estate, on the ground, that the easements were indivisible, and could not attach to the several parts carved out of the estate.

It appears to us, that the law is otherwise; and that a right of way appurtenant to land is appurtenant to all and every part of the land, and that upon a division of land, to which a right of way is attached, a right of way will exist in the owner of each of the parts, into which it is divided. *Watson* v. *Bioren*, 1 Serg. & R. 229.

Besides, we think it pretty evident, from the terms of the deed of Cogswell to the plaintiff, that the parties contemplated the probability of a division of the Bowdoin estate. The grantor reserves to himself, his heirs and assigns, the right of erecting, *at any time*, and of maintaining a fence or wall on the westerly side of Morton Place. The object undoubtedly was, to compel the owners, tenants, or occupants of the estate, future as well as present, to purchase a right of way in Morton Place. The deed declares: "which reservation is made to enable me, my heirs and assigns, to hinder and debar the owners, tenants and occupants adjoining said court, on the westerly side thereof, from using said court, or having any communication therewith, except by my or their permission and consent." To limit this right to those who then were the owners, tenants and occupants of the Bowdoin estate would be a narrow construction of the deeds; for, upon such construction, if there were occupants or tenants who were not owners, the reserved power would be inapplicable. We take the true construction to be, that the grantor reserved to himself, his heirs and assigns, the right of excluding from

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Morton Place every person who then was, or should afterwards become, an owner, occupant, or a tenant, of the whole, or of any part, of the Bowdoin estate. If this view be correct, a division of that estate was anticipated by the parties to the deed, and the grantor reserved the right to sell the right of passage in Morton Place, to any person who then was, or should afterwards become, either the owner, the tenant, or the occupant, of any part of that estate.

The grant to the plaintiff is not of an exclusive easement, or of an easement in common with the owners of estates on the east side of Morton Place; but of an easement in common with all persons whose estates are bounded on that place or communicate therewith, including, of course, the owners, tenants and occupants of the Bowdoin estate. The court are clearly of opinion, that the defendants are entitled to the easement in Morton Place, for which they contend.

2. The remaining question is, whether the defendants have exercised their rights in a reasonable and lawful manner, or whether they have been guilty of acts contravening the rights of the plaintiff, and for which he is entitled to a remedy at law.

This must depend upon the construction of the grant from Cogswell to the plaintiff. The grant is of "the privilege of using said court or passage way called Morton Place, which, with the sidewalk, is about thirty feet in width, for the purpose of a passage way, in common with all other persons whose estates are bounded thereby or communicate therewith." This grant is followed by the reservation, which has been already the subject of comment.

By virtue of this grant, which was prior to the grant from Cogswell, under which the defendants claim, it is contended, that the defendants are precluded from making any alterations in Morton Place, which produce any inconvenience to the plaintiff; while it is conceded, that, with this limitation, the defendants may use the passage way in any manner, which may be most convenient to themselves. As a general proposition, we think it to be true, that the owner of land, adjoin-

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ing a passage way, has no right to use the way, in a manner which produces any serious inconvenience to the owner of the easement. But general propositions are liable to be much modified by circumstances: *in generalibus versatur error.*

If the grantor of this easement had reserved to himself, in express terms, and had granted to the defendants, the right to make the alterations and improvements of which the plaintiff now complains, these actions, of course, could not be maintained. But the plaintiff is as much bound by all necessary implications, springing from or arising out of the grant, by a just construction of it, as by the express provisions of the instrument. The title of the plaintiff is, comparatively, of recent origin. A right of way is created over valuable land, in the midst of a populous city. The parties to the grant must be presumed to have been well acquainted with the usages of the place, and to have created this easement with a reference to those usages. It is not in the least degree probable, that the parties intended to make this particular spot an exception to the usual course of affairs, or that they designed to interdict the common and ordinary uses and improvements incident to such a locality.

The defendants have a right to make a reasonable use of the way adjoining to their land; and public usage, — the use, which others, similarly situated, make of their land, — is evidence of a reasonable use. Such was the doctrine of this court, in the case of *O'Linda* v. *Lothrop*, 21 Pick. 292, and the principle of that case is sustained by the spirit of earlier decisions. *Senhouse* v. *Christian*, 1 T. R. 560; *Gerard* v. *Cook*, 2 Bos. & Pul. 109.

We consider this to be a just and equitable rule of construction, which, while it imposes no unnecessary restraints upon the defendants, affords all reasonable protection to the rights and interests of the plaintiff; and we think it decisive, in the present actions; for we are not satisfied, that the defendants have made any use of the passage way, or that they have done any acts on their lands adjoining thereto, which are not justified by a common and well established usage in the place.

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It is understood, that the principal matter in controversy between the parties was as to the rule of law, by which these actions ought to be governed. Plans of the premises have been exhibited, and the evidence taken at the trial has been submitted to the court, under an agreement, that if, in their opinion, the defendants had a right, by their deeds, to erect and maintain the structures complained of, judgment should be entered for the defendants. The opinion of the court being in favor of the defendants, judgment must be entered accordingly.

David F. Bradley *vs.* Isaac P. Clark.

In an action for goods sold and delivered, an admission by the defendant, that he purchased and received the goods in question, to be paid for, not in money, but in specific articles, is not sufficient to entitle him to open and close, under the forty-first rule of the court of common pleas.

An action for goods sold and delivered having been referred under the statute (Rev. Sts. *c.* 96, § 25) to an auditor, who reported, that it was objected that the goods were sold on barter account, and to be paid for in printer's ink, — that the objection was sustained only as to a part of the goods, which were paid for accordingly, by way of set-off, — and that the plaintiff was entitled to recover for the balance of the account; — it was held, that the auditor had not therein exceeded his authority.

This was an action, to recover for goods sold and delivered, according to an account annexed to the writ. The defendant pleaded the general issue, and filed a specification of his defence, together with an account in set-off. The ground of defence was, that the goods were to be paid for in a specific article, to wit, printer's ink, and not in money. The case was referred to an auditor under the Rev. Sts. *c.* 96, § 25, who subsequently made his report thereon.

On the trial, which took place before *Wells*, C. J., in the court of common pleas, the defendant filed an admission, in writing, that he had purchased and received the goods, which were the subject of the action, and at the prices at which they were charged by the plaintiff, but alleged, at the same time, that the goods were so purchased and received on barter

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account; and he thereupon claimed the right to open and close to the jury, under the forty-first rule of the court of common pleas. The presiding judge, being of opinion, that the defendant would not bring his case within the rule, unless he should admit that the balance (the amount sued for, after deducting the set-off) was to be paid in cash, refused to allow the defendant to open and close.

The plaintiff having offered the auditor's report in evidence to the jury, the defendant objected to a portion thereof, on the ground, that the auditor had therein exceeded his authority under the statute. He therefore moved that the clause objected to should be stricken from the report. The clause in question is as follows:

"It was next objected, that the goods were sold on barter account, to be paid for in printer's ink. This objection was not sustained, except as to part, which was paid in printer's ink by set-off. The auditor therefore reports that the plaintiff ought to recover the aforesaid amounts, subject to the set-off hereinafter allowed."

The judge was of opinion, that the special finding of the auditor upon the question of barter was immaterial, inasmuch, as in stating the account between the parties, it was necessary for him to decide, whether any of the items of the plaintiff's account were irrecoverable, by reason of their being made payable in barter; and that the report, independent of the special finding, was *prima facie* evidence of the indebtedness of the defendant, as to all the items of the account allowed, as well those to which the objection of being payable in barter applied, as to the rest. The defendant's motion was thereupon disallowed, and the report submitted to the jury, who returned a verdict for the plaintiff. The defendant filed exceptions.

W. R. P. Washburn, for the defendant.

E. D. Sohier, for the plaintiff.

Shaw, C. J. In an action of assumpsit for goods sold and delivered, the defence was, that the goods were received and purchased on a barter account. The defendant filed an admis-

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sion, that he had purchased and received the goods at the prices charged, but alleged that they were so purchased on barter account, that is, to be paid for not in money but in other goods. He thereupon claimed the right to open and close, under the forty-first rule of the court of common pleas, which claim was not sanctioned by the court. We think the decision was right. The defence was matter of denial, not of avoidance. On indebitatus assumpsit, for goods sold and delivered, the plaintiff must prove a sale upon an express or implied contract to pay for them in money; otherwise there is no debt. A delivery of goods, upon a special agreement to deliver other goods in satisfaction, is a special contract and a good one, but it creates no debt. If such were the cause of action relied on, it must be specially declared on, with an averment of a breach, by alleging a demand of the goods stipulated to be given in satisfaction, and a refusal or neglect of the defendant to deliver them. When, therefore, the defendant insisted that the goods were received upon a barter account, he denied the existence of the plaintiff's cause of action, and left the affirmative upon the plaintiff, and the burden of proof to establish his main allegation, a sale for money. He did not bring himself within the rule.

The defendant filed a specification of defence and a set-off, insisting that all the goods were to be paid for in a specific article. The cause had been referred to an auditor under the statute. The auditor's report, as we understand it, states that it was objected that the goods were sold on barter account, to be paid for in printer's ink, but that the proof did not sustain the objection except as to part, which was paid for in printer's ink, by way of set-off. He therefore reported, that the plaintiff ought to recover certain amounts, subject to the set-off allowed.

This part of the report was objected to, on the ground, that the auditor had exceeded his authority, in reporting upon matter not submitted to him, by expressing an opinion upon the grounds of defence. The court took a different view and admitted the report. It appears to us, that the auditor acted

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within the scope of his authority, and that by force of the statute his report was admissible and competent evidence. This is determined by the considerations above stated. It was for the plaintiff to prove a sale for money; the defendant insisted that the whole of the goods were delivered on barter account, to be paid for, not in money, but in exchange for a specific article. The whole account was referred to the auditor, to find whether any, and, if any, which of the articles were sold for money, and the finding that they were or were not sold on barter account, which negatived their being sold for cash, was directly within the range of inquiry, and of course within the scope of his authority. The auditor found that certain items were on barter account, and these were deducted from the set-off, leaving the balance as items due in money, and the jury found for the plaintiff, subject to the set-off.

Exceptions overruled.

BENJAMIN F. HALLETT *vs.* JOSIAH OAKES.

Where one, who is restrained of his liberty against his will, and without legal process, as an insane person, employs counsel to prosecute a writ of *habeas corpus*, on his behalf, for the purpose of investigating the grounds and circumstances of the restraint, the counsel so employed will be entitled to recover a reasonable compensation for his services, provided they be rendered in good faith, and upon due inquiry into the causes of the confinement, and the condition of the party be such, that an investigation before a judicial tribunal is proper.

THIS action was brought to recover for professional services, rendered by the plaintiff, as an attorney and counsellor at law, for the defendant, between July, 1842, and January 16, 1845, and was tried before *Wells*, C. J., in the court of common pleas.

It was admitted, on the part of the defendant, that the services were performed, and that the charges therefor were reasonable. The defendant, by his guardian, paid into court, under the rule, the amount of the charges for services rendered previous to January, 1845.

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In regard to the services, which were the subject of the charges between the 1st and 16th of January, 1845, it appeared, that the defendant was then confined as a patient in the M'Lean Asylum for the insane, not under any process of law, but upon such evidence as the regulations of that institution required; that the plaintiff, at the request of the defendant, rendered the services in question, in prosecuting a writ of *habeas corpus* in this court, in order to relieve the defendant from his restraint; and that upon the hearing the defendant was remanded to the asylum as an insane person.

It also appeared, that, on the 5th of December, 1844, an application was made to the judge of probate for the county of Middlesex, to appoint a guardian for the defendant, as an insane person; that notice was duly given of the same to the defendant, and of the time and place for the hearing thereon; that, on the 16th of December, the defendant was taken and conveyed to the asylum, and there received, the usual forms for the admission of patients having been previously observed and complied with; and that after the decision of this court upon the *habeas corpus*, namely, the 19th of January, 1845, Amory Hooton was duly appointed guardian of the defendant, as an insane person. The guardian appeared and took upon himself the defence of this action. There was evidence on both sides, as to the sanity and capacity of the defendant, at the time the services in question were rendered.

The plaintiff contended, that even if the defendant were insane, yet, as he was restrained of his liberty without legal process, he was entitled to a legal investigation of the cause of the restraint, and to the aid of counsel in such investigation, and that until he had been placed under guardianship as an insane person, he would be liable for all reasonable and beneficial services, which might be rendered for him, suitable to his condition and circumstances.

The court instructed the jury, that (assuming the defendant to be restrained of his liberty against his will, and without any legal process) if they should be satisfied, upon the evidence, that he was insane, at the time of the contract; or that his

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condition was such, that it was proper that the question of his insanity, and the propriety of his confinement, should be investigated before some legal tribunal; and that the plaintiff, at the request of the defendant, and acting in good faith, and upon due inquiry into the grounds and causes of his confinement, instituted and prosecuted the proper legal proceedings for a judicial inquiry into the grounds of the restraint imposed upon the defendant, the plaintiff would be entitled to recover a reasonable compensation for his services; and that such services might be regarded in the light of necessaries, for which the defendant would be liable, upon the same principle that minors are liable for necessaries.

The jury found a verdict for the plaintiff; and, in reply to a question by the court, stated that being unable to agree on the question of the defendant's insanity, they gave their verdict for the plaintiff on the other ground submitted to them.

The defendant, by his guardian, filed exceptions to the instructions.

E. Buttrick, for the defendant.

B. F. Hallett, for himself.

Shaw, C. J. The jury not having agreed upon the fact, whether the defendant was or was not insane, at the time the services were rendered by the plaintiff, the question arises upon the other branch of the instructions, which relates to the defendant's liability as upon an implied contract for necessaries.

The court are of opinion, that the direction was correct. It proceeds on the ground, that the contract of a person of unsound mind is voidable but not void (*Allis* v. *Billings*, 6 Met. 415); and, then, whether void or not, in any particular case, must depend on the circumstances.

Mental capacity is undoubtedly necessary to the validity of an express contract, which derives its force from the mutual agreement of the parties. But a party may be liable on an implied liability for supplies and services, which are reasonable and proper, and suitable to the state and condition of such party, though at the time he is not of sound mind. The contracts of such persons are placed in many respects on the

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same footing with those of infants. *Seaver* v. *Phelps*, 11 Pick. 304; *Baxter* v. *Earl of Portsmouth*, 5 B. & C. 170; *S. C.* 7 D. & R. 614, and 2 C. & P. 178.

In the case of a person wounded, or fallen in an apoplexy, we suppose, that if medical relief, suitable and necessary to his condition, is called by others before he becomes conscious, he will be liable, on a *quantum meruit*, for such professional services.

If, during a person's last sickness, accompanied with delirium and insanity, from which he never recovers, he should be attended by physicians and nurses called in by friends, or be supplied with medicines and other necessaries suitable to his condition, at the instance of his family or other attendants, we suppose that such services and supplies would constitute a good legal claim, which, by statute, is made a preferred one, on his estate.

Cases may be supposed, in which legal professional services may be as necessary to a person in such an unhappy condition, as medical, and yet no one may have express authority to procure them. We think that services of this description would stand upon the ground of food, fuel, and other necessary supplies, where, from the duty of making a reasonable compensation, the law implies a promise. Of course, if such supplies or services are not necessary, if any imposition be practised, or advantage taken, either by the person making the claim, or by any one in privity or in concert with him, no such duty arises, and no such promise is implied. That is always a question for the jury, if contested.

In the present case, we think the rule of law was correctly stated, and with proper qualifications. We must not be governed by the consideration, that the defendant was subsequently adjudged to be insane; at the time the plaintiff was retained, the defendant was restrained of his liberty, without warrant of law, that is to say, without legal process; and there was ample room for supposing, that he was not insane, and, of course, was unlawfully restrained of his liberty. If such was the fact, nothing could be more necessary to the

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well being of the defendant than to obtain his liberty, and, for that purpose, to put in motion the proper proceedings for bringing his right to a judicial determination.

Exceptions overruled.

GEORGE S. FOGG *vs.* JOSEPH WILLCUTT.

Where the payee of a negotiable promissory note, for the purpose of indemnifying one who had become his surety for the payment of the fees and expenses attending the institution of proceedings in insolvency, negotiated and transferred the note to the surety, before the commencement of such proceedings, it was held, that, in the absence of fraud, the maker of the note could not set up in defence the title of the payee's assignee, and that it was immaterial whether the note was indorsed by the payee before or after his insolvency.

THIS was an action by the plaintiff, as the indorsee, against the defendant, as the maker, of a promissory note, dated August 14th, 1843, for thirty dollars and thirty-three cents, payable in three months to the order of Lyman Wood, and indorsed by him.

It appeared, on the trial, which was in the court of common pleas, before *Ward*, J., that, about the time of the date of the note, Lyman Wood, the payee, applied to a master in chancery, for the benefit of the insolvent law; that the master refused to allow proceedings for that purpose to be commenced, until he had been secured for his fees and expenses; that the plaintiff thereupon at the request of Wood became his surety; and, that Wood, at the same time, delivered the plaintiff the note in suit, as security for whatever fees, &c., he might be obliged to pay the master. It was doubtful, upon the evidence, whether the indorsement by Wood was made before or after, though the note was delivered to the plaintiff before, the commencement of the proceedings in insolvency. The assignment of Wood's estate bears date September 4th, 1843, and purports to convey all the property, &c., of which he was possessed, on the 18th of August, 1843.

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It was contended for the defendant, that Wood could not lawfully transfer the note, at the time, and for the purpose, mentioned; and that the same then was, in fact, the property of the assignee, by virtue of the assignment in insolvency.

But the jury were instructed, that, in the absence of all fraudulent intent, on the part of Wood, he might lawfully transfer the note to the plaintiff; and a verdict being found accordingly, the defendant excepted

H. Wellington, for the defendant

E. N. Moore, for the plaintiff.

By the Court. The instruction was right; and upon the facts stated, — the plaintiff claiming as indorsee of a negotiable note not dishonored, proving himself the holder, and having a legal title, — we think that the defendant could not set up title in a third person, by way of defence. Even if the assignee could have avoided the effect of an indorsement of the note, it was a right which he might waive. The defendant could not avail himself of it. Perhaps, if the assignee had demanded payment of the note of the defendant, and given him notice not to pay it to the plaintiff, the defendant, in behalf of the assignee, might have been let in to prove that the indorsement was fraudulent, if such was the fact. But no such notice from the assignee, or demand upon himself, was shown by the defendant. It could make no difference, if the note had been actually indorsed after the commencement of the proceedings in insolvency, it being found that it was previously negotiated and delivered to the plaintiff, which made a good equitable title. *Ranger* v. *Cary*, 1 Met. 369.

Exceptions overruled.

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Mowry L. Britton *vs.* The Commonwealth.

The Rev. Sts. *c.* 126, §§ 39 to 45, enumerate all the different classes of malicious mischief to property, which are made punishable by law, and provide a specific punishment for each class: § 39 further provides, that, for all offences of the same kind, committed "in any manner, or by any means, not particularly described or mentioned" in the same chapter, the punishment shall be "imprisonment in the state prison not more than five years, or by fine," &c.: The subsequent statute of 1846, *c.* 52, § 1, provides, that, in all cases of malicious mischief, committed "in any manner, or by any means, not particularly described or mentioned in the one hundred and twenty-sixth chapter of the Rev. Sts.," the punishment shall be "by imprisonment in the county jail or house of correction, *not more* than thirty days, or by fine," &c.: It was held, that the negative words, in the last mentioned statute, limiting the punishment, operated to repeal so much of the Rev. Sts. *c.* 126, § 39, as relates to the punishment of the offences therein described in the general terms above mentioned.

A plaintiff in error, who is discharged on the writ, is entitled to his costs for travel, as an item of the legal costs, to be "borne by the commonwealth," notwithstanding, that, during the pendency of the writ of error, he is imprisoned in a house of correction under the sentence against him.

The plaintiff in error was tried before a justice of the peace for the county of Worcester, on a complaint, which set forth, that, on the first day of November, in the year eighteen hundred and forty-five, he did, wilfully and maliciously, destroy and injure a wagon harness, the property of the complainant, of the value of seven dollars, by wilfully and maliciously cutting the same to pieces. Being convicted of the offence thus charged, and sentenced therefor to imprisonment in the house of correction for thirty days, the plaintiff appealed to the court of common pleas.

In that court, the plaintiff withdrew the plea of not guilty, upon which he was tried before the justice, and, by way of plea, said he would not contend with the commonwealth He was thereupon sentenced for his offence to imprisonment in the house of correction for the term of three months, to commence immediately from and after the termination of another sentence against him by the same court.

The plaintiff brought his writ of error to reverse the said judgment.

The only error assigned was, that the plaintiff was sen-

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tenced to imprisonment in the house of correction, for the term of three months; whereas, by law, he could not be sentenced thereto for a longer period than thirty days.

H. D. Stone, for the plaintiff.

S. D. Parker, for the commonwealth.

Shaw, C. J. This is a writ of error to reverse a judgment of the court of common pleas in the county of Worcester, upon which the plaintiff in error was sentenced to three months' imprisonment in the house of correction. The prosecution was commenced by a complaint before a justice of the peace, and carried by appeal to the court of common pleas. It was a charge of malicious mischief, in destroying personal property of less value than fifteen dollars, to wit, of the value of seven dollars.

The court are of opinion, that, on this conviction, the punishment cannot exceed thirty days' imprisonment, and therefore that the judgment is erroneous, and must be reversed.

By the statute of 1846, *c.* 52, § 1, every person, maliciously injuring or destroying personal property of another, by any means not particularly described or mentioned in the Rev. Sts. *c.* 126, §§ 39 and following, when the value of the property or damage shall not be alleged to exceed fifteen dollars, shall be punished by imprisonment for not more than thirty days, or by fine not exceeding fifteen dollars.

But it is argued on the part of the commonwealth, that the statute of 1846 only makes provision for a class of offences, which are not provided for by the revised statutes; and that the offence in question comes within the description of the latter, and is properly punishable under the thirty-ninth section of the chapter already referred to, which authorizes a punishment by imprisonment not exceeding five years. This section (Rev. Sts. *c.* 126, § 39) extends to and makes punishable malicious mischief, &c., in destroying or injuring personal property, "in any manner or by any means not particularly described or mentioned in this chapter." In consequence of the extreme generality of this language, which makes it in-

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clude offences of every degree, from the slightest to the most aggravated, great latitude was given to the courts in reference to the punishment, and the jurisdiction was limited to courts of record.

The argument is, that the statute of 1846 was intended to embrace a class of cases not made punishable by the revised statutes. If this were the intent, the statute of 1846 would be absolutely a dead letter; there could be nothing for it to act upon, because every case, which could come within it, comes within the revised statutes by exactly the same description, that is, malicious injury to personal property, "in any manner, or by any means, not particularly described or mentioned in this chapter." We think, however, that the statute is not chargeable with any such absurdity; but that it has a plain and significant meaning.

The malicious injury to personal property, which is referred to in the Rev. Sts. *c.* 126, § 39, is that done in any manner or by any means not particularly described or mentioned in that chapter. Of course, all means not coming within this last general clause were those, which were particularly mentioned or described in the same chapter. Then, when further provision is made, in a statute *in pari materia*, not altering the class of cases, but making further provision for the prosecution of a part of them, to wit, those in which the value of the property, or the injury complained of, was less than fifteen dollars, the same words mean the same thing, namely, in any manner, or by any means, not particularly described or mentioned in the revised statutes. They are used in the statute of 1846, just as they are in the revised statutes, to embrace, in the broadest terms, all cases not particularly described, but only alluded to in general terms. This construction makes the two statutes perfectly harmonious and intelligible. It leaves the revised statutes in full operation as to all malicious injury to property not exceeding fifteen dollars in value; but when the value is less, it limits the punishment to a term of imprisonment of not more than thirty days, and gives a concurrent jurisdiction to justices of the peace.

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But it is argued, that if the two statutes do describe th same class of offences, still, as there are no repealing words in the statute of 1846, the provisions of the revised statutes are also in force, and that as the conviction of the defendant by the justice was vacated by his appeal to the court of common pleas, that court had authority, under the revised statutes, to impose the larger penalty.

Without stopping to inquire, whether an appellate court can ever give a longer sentence than the court appealed from might have given, we are of opinion, that the statute of 1846 does repeal the provisions of the revised statutes to a certain extent. It is a statute *in pari materia*, and, after describing the class of offences intended to be affected by it in the same terms with the revised statutes, it provides, that the party convicted thereof shall, when the value of the property so injured or destroyed, or the injury occasioned to the same, shall not be alleged to exceed fifteen dollars, be punished by imprisonment in the county jail or house of correction for *not more* than thirty days. These negative words, in a subsequent statute, do limit and restrain the operation of the revised statutes, as to all the cases within such statute, as effectually as any words of repeal could do; so that if this case had been a conviction in the court of common pleas, on a prosecution originally commenced there, under the concurrent jurisdiction of that court, the punishment could not have exceeded thirty days' imprisonment.

The statute of 1846 seems only to have carried out what was contemplated when the revised statutes were passed. The general clause above cited from the Rev. Sts. c. 126, § 39, was not reported by the commissioners as a part of the corresponding section (§ 35) in their report; but this clause was added by the legislative committee. The same committee also reported an additional section, giving jurisdiction in this and in several other classes of malicious mischief, in petty cases, not exceeding fifteen dollars, to a justice of the peace, and limiting the punishment by imprisonment to a term not exceeding thirty days. The legislature, in finally

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passing the revised statutes, having adopted one of the amend ments proposed by the committee and not the other, left every case of malicious mischief to any personal property, however trifling, to be prosecuted only by indictment, in a court of record, and punishable by imprisonment in the state prison not exceeding five years. As this could hardly have been intended by a wise legislature, it was probably the result of some oversight in bringing together the provisions of so voluminous a work, and was very properly set right by the additional statute.

Judgment reversed.

The judgment being reversed, and the plaintiff in error discharged therefrom, a question was made by the attorney for the commonwealth, whether the plaintiff, being imprisoned during the pendency of the writ of error in the house of correction, in pursuance of his sentence thereto, was entitled to costs for his travel.

By the Court. The *St.* of 1842, *c.* 54, § 3, provides, generally, that in case of the discharge of the plaintiff on the writ of error, "the legal costs shall be borne by the commonwealth." The travel being a part of the legal costs, the plaintiff is entitled to it, notwithstanding his imprisonment

Rosa Garey *vs.* Charles Ellis & another.

A building, which extends into the harbor of Boston, beyond the commissioners line established under the acts of 1837, *c.* 229, and 1840, *c.* 35, and which is also below low water mark, and an obstruction to the navigation, is a public nuisance, notwithstanding it was erected previous to the passing of those acts.

This was an action on the case, against the defendants, for negligence in running their vessel against a building belonging to the plaintiff, and injuring the same.

The trial was before *Wells*, C. J., in the court of common pleas.

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The defence was placed on two grounds, first, that the building extended beyond and projected over the line of the harbor of Boston, as established by commissioners, under the acts of 1837, c. 229, and 1840, c. 35, and was a nuisance; and, second, that the building extended over the channel of the harbor and below low water mark.

The defendants introduced evidence to prove, that the building extended beyond the commissioners' line, and was below low water mark, and was an obstruction to those having occasion to navigate that portion of the channel over which it was placed.

The plaintiff then offered evidence to show, that before the acts referred to were passed and the line run, as well as at the time when the line was run, the plaintiff's building was located and stood in the same place, extending and projecting as far as it then did beyond and over the line; and contended, that by the acts above mentioned all erections so existing were legalized, and could not in law be regarded as nuisances.

But the court ruled, that if the plaintiff's building had been so erected previous to the passing of the act, and had so remained previous to, at the time and ever since, the running of the line, this fact would not constitute a justification or license to the plaintiff, provided the building were below low water mark, and an obstruction to the navigation.

The jury found a verdict for the defendants, and the plaintiff filed exceptions.

C. M. Ellis, for the defendants.

There was no appearance for the plaintiff.

By the Court. By the law, as it stood before the passing of the statutes of 1837, c. 229, and 1840, c. 35, any building beyond the line of low water mark, upon navigable tide waters, was an encroachment upon public right, and, if it obstructed navigation, was a public nuisance. The building, which is the subject of the alleged injury in the present case, is found by the jury to be below low water mark, and to be an obstruction to navigation. The plaintiff, being herself a

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wrong-doer, in having her building there, can maintain no action for the alleged damage. *Arundel* v. *M'Culloch*, 10 Mass. 70. The direction complained of was right, and the exceptions are overruled.

Judgment for the defendants.

JOHN O. SYLVESTER *vs.* JOSHUA C. MAYO & another.
SAME *vs.* SAME.

The court of common pleas is not bound to entertain and consider a motion for a new trial, for a misdirection of the jury in matter of law; and such motion ought not to be considered, unless upon the understanding, that the parties are to abide the result.

Where the party, against whom a verdict is rendered in the court of common pleas, moves the court for a new trial, on the ground of a misdirection of the jury in matter of law, and the motion is considered and overruled, the right to allege exceptions to the supposed misdirection is thereby waived.

THIS was a petition, filed at the November term, 1846, for a writ of mandamus, to be issued to the chief justice of the court of common pleas, requiring him to allow and sign bills of exceptions, in the cases above entitled, under the following circumstances.

The plaintiff brought actions of debt, against the defendants, in the court of common pleas, to recover penalties for selling adulterated oil, in violation of the provisions of the Rev. Sts. *c.* 28, §§ 169 to 173. The defendants pleaded the general issue, which was joined, and, by order of the court, the two cases were tried together and submitted to the same jury. On the trial, which took place before *Wells*, C. J., it was proved, that the defendants were partners in trade; but it was contended, on their behalf, that the evidence in each action was insufficient to charge more than one of them; and their counsel, in his opening, stated it as a rule of law, that, unless the evidence was sufficient to prove the liability of both defendants, no action could be maintained against either This position was not controverted by the counsel

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for the plaintiff, and was adopted by the judge in his charge to the jury, as a correct statement of the rule of law. The jury returned verdicts for the defendants in both actions.

The plaintiff then moved the court for a new trial, on the ground, that the rule of law as above stated was incorrect; and, consequently, that the instructions to the jury were erroneous. This motion was argued by counsel, on both sides, and was overruled by the court. The plaintiff, thereupon, filed exceptions to the instructions; but the judge, before whom the proceedings took place, being of opinion, that, under the circumstances stated, it was not competent for the plaintiff to allege exceptions, refused to allow the same. The trial, the hearing of the motion for a new trial, and the filing of the exceptions, were all at the same term of the court.

The defendants filed an answer in writing to the plaintiff's petition, in which they objected to the granting of the prayer thereof, on the several grounds taken by their counsel in argument.

The case was argued in writing, at a former term, by *W. Hilliard*, for the petitioner, and by *W. Brigham*, for the respondents.

On the part of the respondents, it was contended:

1. That, inasmuch as the rule of law, stated by the defendants' counsel, and laid down by the court, was not objected to but sanctioned by the plaintiff, the latter was not aggrieved thereby; and, further, that by not making his objection at the time, the plaintiff had lost his right to except. *Jones* v. *The Ins. Co. of N. A.*, 1 Bin. 38; *Leach* v. *Woods*, 14 Pick. 461.

2. That, by filing a motion for a new trial, the plaintiff had thereby submitted the whole matter, finally and exclusively, to the discretion of the court of common pleas, and could not afterwards revise the decision thereon, by means of a bill of exceptions. *Chase* v. *Blackstone Canal Co.*, 10 Pick. 244; *Gray* v. *Bridge*, 11 Pick. 189; *Morse, Pet'r.*, 18 Pick. 443.

3. That the instruction complained of was correct. *Hill* v

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Davis, 4 Mass. 137; *Boutelle* v. *Nourse*, 4 Mass. 431; *Burnham* v. *Webster*, 5 Mass. 266, 270.

4. That, by the Rev. Sts. *c.* 82, §§ 12 and 14, exceptions must be taken in the court of common pleas, and allowed, at the term when the trial takes place, and must be entered at the next following term of this court; and, inasmuch as the term of this court, next following the proceedings in the common pleas, had long since passed, the writ prayed for, if now granted, would be wholly unavailing.

It was argued for the petitioner:

1. That there was nothing in the circumstances of the case to justify the court below in refusing to allow the exceptions. It is the duty of the court to instruct the jury correctly, upon every material point of law arising on the trial; and exceptions may be taken to incorrect instructions, even though counsel, believing, at the time, that the instructions are proper, make no objection to them. Exceptions may be alleged, for the first time, after the verdict is returned. *Buckland* v. *Charlemont*, 3 Pick. 173. It is no objection to the right to except, that the ground of exception has previously been made the ground of a motion for a new trial, which has been overruled; the party excepting is none the less "aggrieved by the opinion, direction, or judgment of the court of common pleas," within the meaning of the statute. There is no discretion in the court below to allow or disallow a bill of exceptions; the statute being express, that if "found conformable to the truth," the exceptions shall be allowed and signed. Rev. Sts. *c.* 82, § 12.

2. The instruction objected to was erroneous. *Wortley* v. *Herpingham*, Cro. Eliz. 766; *Coppin* v. *Carter*, 1 T. R. 462; *Bastard* v. *Hancock*, Carth. 361; *Hardyman* v. *Whitaker*, 2 East, 573, note; *Powers* v. *Spear*, 3 N. H. 35. The cases of *Hill* v. *Davis*, and *Burnham* v. *Webster*, cited for the defendants, are distinguishable from the present.

3. The court has authority to issue a writ of mandamus, in this case. Rev. Sts. *c.* 81, § 5. And it is the appropriate remedy. *Crane, Ex parte*, 5 Peters, 190; *People* v. *Judges of Washington County*, 1 Caines, 511.

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4. The suggestion, that judgments have already been entered in the actions referred to, is not true; if it were, the fact would be immaterial, inasmuch as if the exceptions had been allowed, judgment would notwithstanding be rendered, though no execution could be issued thereon. Rev. Sts. c. 82, § 13.

Shaw, C. J. In the present case, the court are called upon, by petition, to issue a writ of mandamus to the chief justice of the court of common pleas, to require him to allow bills of exceptions, in the two cases above named. The petition calls for the exercise of one of the highest judicial powers known to the law, and of a grave and delicate character. It is a salutary power, the application for which is addressed to the sound judicial discretion of the court, and is to be exercised to prevent the failure of justice, when other remedies have failed, or prove inadequate.

The facts, upon which this application is founded, as we understand them, are briefly these. When the actions were tried in the court of common pleas, a rule of law was stated by the counsel for the defendants, as applicable to the cases, and was not controverted by the plaintiff's counsel, and was adopted and stated by the judge, as a rule of law, in his charge to the jury. Afterwards, and after verdicts were returned for the defendants, the plaintiff moved the same court for a new trial, for a misdirection in matter of law; that court having power to grant a new trial. This motion was argued at the same term and was overruled by the court. Afterwards, but at the same term, the plaintiff presented his bill of exceptions to the instructions of the court, at the trial, with a view to raise the same questions of law, which were considered in the motion for a new trial. The learned judge declined to allow the exceptions.

Whatever may be the power of this court to issue a writ of mandamus to the judge of another court, we are clearly of opinion, that it ought not to be exercised in a case like this.

Whilst the law sedulously provides for securing and guarding every right of suitors, it requires that such rights shall be

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claimed and asserted in due time and in proper order, with a view to prevent delay, surprise, and undue advantage. A party may insist on any irregularity in the process, or on the disability of his adversary. But, by failing to put in a plea in abatement, and pleading to the merits, he waives this privilege, and shall not afterwards insist on such defect. Even where an express requisition of the constitution had not been complied with, inasmuch as it went only to the form of the writ, the defendant was not allowed to defeat the suit, after a plea and trial on the merits. *Ripley* v. *Warren*, 2 Pick. 592. This rule is sometimes made by positive law, as in case of a plea in abatement regulated by statute; but the same principle is adopted, as fit to govern the discretion of the court, upon general principles of justice, where there is no positive law, as in case of a motion to dismiss a suit for irregularity or defect of form. *Simonds* v. *Parker*, 1 Met. 508. So, where a party knows of an exception to an arbitrator; he shall not wait and take his chance for a favorable opinion, and then except to the arbitrator, if the judgment be against him. Such a proceeding is inconsistent with good faith and fair dealing. *Fox* v. *Hazleton*, 10 Pick. 275. So of an exception to a juror, and for the same reason. *Davis* v. *Allen*, 11 Pick. 466.

When the old law of review was in force, by which a losing party might have a review, as a matter of right, the court uniformly declined entertaining a motion for a new trial, on questions of law, unless the party making it would waive his right to a review. This was founded upon the plain principles of right and justice. So with a motion to the court of common pleas, to reconsider its opinion in matters of law, with a view to grant a new trial in that court if erroneous, and if otherwise to confirm the verdict. It is a motion, which, as we understand, that court is not bound to consider; and we think it ought not to be considered, unless it is understood, that the parties intend to abide the result. It would be inconsistent with the duty which the court owe themselves, and unjust to the adverse party, to entertain a motion, and enter into a

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discussion of principles of law, involving delay, labor, and expense, leaving it to the option of the party moving, to profit by the opinion, if in his favor, and to repudiate it, if against him.

We think that these principles are applicable to the present case. The plaintiff acquiesced in the rule of law, laid down by the judge at the trial, as stated by both parties, and asked for no different direction, whilst it would have been available by influencing the verdict, and took no exception until the verdict was rendered against him. Without pausing to consider whether he could demand the allowance of a bill of exceptions, and supposing he could, if, instead of doing this, he requested the court to do what they were not bound to do, that is, to reconsider the law in that court, with a view to a new trial, if it had been wrongly stated at the trial, and the court consented to hear such request, it must have been upon a tacit if not an express consent, that the decision should be final, and consequently amounted to a waiver by the plaintiff of his right to take exceptions, if the decision should be against him

Petition dismissed.

BENJAMIN WHEELER *vs.* ANSON J. STONE & others.

A disseizin of flats may be made by an appropriate occupation thereof for that purpose, as by entering upon and filling them up, or by building a wharf and using the flats adjoining for laying vessels at the same; in which cases, the occupation of the land, or the use of the flats, if exclusive, constitutes a disseizin of the proprietor: But passing with vessels over flats, and anchoring on them, or using them for the purpose of access to and egress from a wharf with vessels, being a usage of common right provided for in the ordinance of 1641, is not inconsistent with the right of the proprietor to a fee in such flats, and constitutes neither a disseizin nor a trespass.

Where it appeared that the tenant in a real action, who had acquired a title to a wharf by disseizin, had also exclusively occupied the flats at the end of the same, to the distance of eighty feet, for the purpose of laying vessels at such end. and had used the flats in front of the wharf, beyond the distance of eighty feet, for the purpose of access to and egress from the wharf with vessels, it was held, that the exclusive occupation to the distance of eighty feet was a disseizin of so much, but that the occupation beyond that distance was not a disseizin of the residue, and that the former did not extend to and create a disseizin of the latter.

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Wheeler v. Stone & others.

This was a real action brought to recover a certain wharf and flats in the harbor of Boston, as incident to the upland estate of the demandant.

At the November term, 1841, after the cause had been opened to the jury, it was ordered, on the agreement of the parties, that it be submitted to William D. Sohier, William Minot and Benjamin Rand, Esquires, to hear the parties, and to report a statement of the title of each of them, and the facts relating thereto, in the same manner as if found by a jury, together with all facts, which the auditors, or either party, might deem material to be considered; and that upon such report, and such inferences as the court might draw therefrom, not inconsistent with the finding of the auditors, the court should determine the course of the lines over the flats, and direct a verdict to be taken and judgment entered thereon for either party, as they should think proper.

In pursuance of this order, the auditors proceeded with the business referred to them, and on the 22d of March, 1843, made their report thereon.

The cause was argued upon the report, (the facts of which, so far as they are material to an understanding of the opinion of the court, are therein stated,) at the March term, 1844, by *C. P. & B. R. Curtis*, for the demandant, and by *W. C. Aylwin & C. G. Loring*, for the tenants.

The opinion of the court was delivered, at the March term, 1845, by

Hubbard, J. The facts found by the auditors, which are important in coming to a decision of the case, are the following:

1. That the tenants and their predecessors have had actual and exclusive possession of the Stone Wharf, and the land under the same, more than sixty years previous to the 1st of August, 1832; that the said wharf has existed for the whole of that period of nearly its present dimensions; and that the whole of the wharf has existed as it now is, for more than forty years previous to the said 1st of August, 1832.

2. That the owners and tenants of the wharf occupied the

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flats at the southerly end of the wharf exclusively, from the time of its erection, to the extent of eighty feet southerly, for the purpose of laying vessels alongside that end of the wharf; and that they used the flats in front of the wharf, beyond the extent of eighty feet, for the purpose of access to and egress from the wharf with vessels.

The demandant claims the flats appurtenant to five distinct lots, the record history of which is traced, in whole or in part, to the first possessions of the inhabitants of Boston. The tenants also claim a wharf and the flats appurtenant, as held by their ancestor under different conveyances, which are also traced to the first possessions. But it is observable, that though the estates are contiguous, neither party traces title to any portion of the premises, from a common ancestor, or from the same owner; and as each estate was wharf property, with the flats appurtenant, there should be no interference of their respective lines, on a proper division of the flats, unless one of the parties has gained a title by disseizin; and, in fact, the tenants, while they allege that they have a good right to the demanded premises, by force of their conveyances, also aver that they have obtained a title to them by disseizin.

Before discussing other points which have arisen in the case, we propose to consider, first, the tenants' claim to the demanded premises by disseizin.

A person may be disseized of flats, as well as of any other lands, and that by an occupation according to the nature of the property. The continual passing over them in vessels and small craft, and anchoring on them, constitutes neither a disseizin nor a trespass; such use in third persons being consistent with the nature of the grant. But if a stranger enters upon flats and fills them up, and continues in possession of the lands thus made, he will, by lapse of time, acquire a perfect title to the soil, and so by building a wharf and using the flats adjoining by laying vessels at it, and doing this exclusively, such a possession will constitute a disseizin of the true owner, and by lapse of time will, if not disturbed, ripen into a perfect title. This is settled in the leading case of *Rust* v. *Boston Mill Corporation*, 6 Pick. 158.

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The learned auditors are well acquainted with the nature of the property, with the use to which it is applied, and with the legal import of the words used by them; and we therefore apply their language according to its legal acceptation, and understand them to find, as a fact, an exclusive seizin and possession of the wharf and the flats in front of it, to the extent of eighty feet, without undertaking to ascertain whether the course of the lines would be the same, when they should be traced by the title deeds.

With the view of the law as above stated, and upon the fact as found by the auditors, we are of opinion, that the eighty feet of flats lying at the southerly end of the tenants' wharf, and that portion of the wharf itself demanded in the writ, as the same is designated on the plan accompanying the report, is well established in the tenants, and the title is not qualified by their use of the words, "for the purpose of laying vessels at and alongside that end of the wharf," such continued use constituting a disseizin; and, consequently, if the predecessors of the demandant ever had the right to the flats, composing the eighty feet in length and of the breadth of the wharf, or any part of them, the title to the same is now lost by disseizin, the tenants not claiming under them.

As to that part of the flats lying in front of the eighty feet, to which the demandant claims title, the auditors find, that "the owners and tenants used the flats in front of the wharf beyond the extent of eighty feet, for the purpose of access to and egress from the wharf with vessels;" and, in respect to these flats, the counsel for the tenants argue, that the predecessors of the demandant have been disseized of them, as they have been of the eighty feet itself; that the entry into and exclusive possession of one part will extend to and create a title to the whole flats; and also that they have in fact appropriated them to their own use, because, as they contend, the demandant's predecessors having been excluded from all beneficial use of them, he therefore is deprived of the right of getting on to them.

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But we cannot give our assent to this reasoning, nor do we think the position supported by any facts proved in the case; the finding of the auditors reaches no further than that the tenants of the wharf used those flats for the purpose of access to and egress from the wharf with vessels; but such use, being provided for in the ordinance itself, by which the flats were originally granted to private individuals, is entirely consistent with the right of the demandant and his predecessors to the fee in the flats, and works no disseizin of the true owner. By such passing over the flats in front, no actual possession was gained, nor any title acquired by disseizin; for titles resting in disseizin are not to be extended by construction.

Nor, in point of fact, were the owners of the defendants' wharves deprived of access to them, (the lower portion of the flats,) because the flats to the south and west were not filled up, and by going over these flats such owners could reach the wharves without trespassing on the tenants; and the amount of benefit arising from such use, even if it were merely nominal to the demandant's predecessors, is unimportant to be considered in a question of title, where the issues and profits are not in question. If, then, the course of the demandant's lines will convey him over the eighty feet in possession of the tenants, his title to the flats lying to the south and east will not be impaired by any disseizin of such eighty feet committed by the owners of the tenants' wharf.

It was argued, that, the previous owner of the wharf above having been disseized of a part below, the portion still nearer to the channel did not pass by a constructive seizin, the intervening part being cut off. But this position, though ingeniously taken, we think unsound. The rightful owners not having been disseized of the part nearest to the channel, they could convey the same; and, using apt words for that purpose, their whole property in the flats would pass according to their intention; and the construction of the deeds, if needful, would be in favor of the grantees, where the intention is declared. Where the words of a deed are such as to convey in terms a larger tract than the grantor owns, all that

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he does own, which is contained within the terms of the description, will pass.

Again, it has been argued, that if mere possession is laid out of the question, the right of these parties may depend on who has the older title; but the titles of the original proprietors originated so nearly at the same time, that we think no stress can be laid upon this argument.

The tenants' counsel assert, that they trace their title to Thomas Joy, who had leave to buy a piece of ground in February, 1636, and to whom, on December 26th, 1642, liberty is granted to set up a house by the water side; but whether this was the same piece of ground, which he had liberty to buy, does not appear; and the subsequent conveyances show that he owned more than one house. Nor does he appear to have had liberty granted him to wharf out. But Thomas Clarke, under whom also the tenants claim, had leave to wharf on the 27th of the 9th month, 1643 (November 27th, 1643).

The demandants, on the other hand, assert that they trace their title to Isaac Cullamore, who bounded on the cove southeast. The date of his possession is not given, but he was bounded by Bart. Passmore on the south-west, and Passmore sold to Sweet, on the 2d of the 10th month, 1641 (December 2d, 1641), so that his possession was prior to that time, and, for all that appears, as early as that of Joy; and we find that Cullamore had leave to wharf on the 29th of the 11th month, 1643 (January 11th, 1643), only two months after the date of the like permission to Clarke, and from the description of Upshall's estate, from whom the demandant's title is regularly traced, it is evident he bought of Cullamore, and Upshall also had like liberty to wharf on the 29th of the 5th month, 1644 (July 29th, 1644).

A learned and interesting account has been given us by the senior counsel for the tenants, as to the origin of titles in the colony, and the early settlement and incorporation of the town; and he contends that the title to the ungranted lands in the town, and to the flats, passed from the government to

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the town of Boston, by the act of incorporation; that after the ordinance of 1641, the acts of the abutters recognize the existence of the rights of the town in the flats, and that the town controlled the use of the flats and granted liberty to wharf out to low water mark; and that this is shown conclusively by the doings of the town in 1673, when the barricado titles were created;* and that the parties, at the time of the demandant's action, were in under the grantees from the town of the barricado titles; and the conclusion he draws is, that the demandants cannot extend their claim beyond the circular line, and consequently can have no right to the demanded premises.

But, in answer to this, the auditors, in their thirteenth answer to the tenants' points, say, "they have no evidence that the circular line has been recognized by the parties or their predecessors for any practical purpose," and they also say, "they are unable to define the course of the circular line as bearing on the matters in difference between the parties."

But, it is not to be overlooked, that if the demandants claim from grantees under the barricado title, the same is true in respect to the tenants, and the consequence is, that there is but an estoppel against an estoppel, which sets the matter at large. 1 Rol. Abr. 874, l. 50; 4 Com. Dig. Estop., E. 9.

It has been contended, by the counsel for the demandant, that the town had no right or authority to fix the circular line, as a boundary beyond which the wharves should not be extended, and that the town as such had no title to the flats, and a case of *Foster* v. *The City of Boston* has been cited, which was tried, it is said, before chief justice Parker, in which the city relied in their defence upon the barricado title, and the circular line, but that the chief justice disregarded them, and judgment was given against the city. But the facts, in regard to the case, are so concisely mentioned, and the manner in which the questions arose and were decided, so imperfectly stated, that we cannot place great reliance on that decision.

* The origin of the barricado title is explained by Putnam, J., 5 Pick. 135.

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Nor are we disposed, on due consideration, by any thing we may say in this case, to disparage the barricado title, so called, believing that many estates are held under it, or in conformity with it; and we put the decision of this case, so far as that question is concerned, on the finding of the auditors, that neither the parties nor their predecessors recognized it for any practical purpose.

An order was then made in the cause, with the consent of the parties, appointing George R. Baldwin a surveyor to measure the cove between the north and south battery (within which were the flats in question); to ascertain and lay down the lines of high water and low water, as they existed at the time of the original grants to the predecessors of the respective parties, as near as the same could then be ascertained; and to lay down the line of low water from one battery to the other, and thereon to mark the lines of the respective estates, so far as the same were necessary to ascertain the lines on the flats of the estates claimed by the parties. The surveyor was also required to direct the running of such lines, as the parties, or either of them, might think necessary to enable them to present their views of the case, on the return of the survey and report.

The surveyor, having proceeded under the commission, and completed his survey, made an elaborate report thereon, accompanied by two plans, on the 28th of March, 1846. One of the plans contained a delineation of the survey specified in the commission. The other was drawn with a view to illustrate the operation of the rule heretofore established, and of several new ones suggested by the surveyor, for the division of flats among the conterminous proprietors of the upland estates adjoining, in their application, respectively, to the premises in question.

The cause was argued upon the surveyor's report, at the present term, and the opinion of the court was delivered by

Shaw, C. J. Several years have elapsed since this case was

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commenced, and it has been many times before the court, in various forms. The object was to try the title to a parcel of flats in Boston harbor, formerly of little value, but which, by the progress of improvement, and the enhanced value of land adapted to maritime and commercial purposes, have come to be of great importance. The facts were exceedingly complicated, and intricate, involving inquiries which extended back more than two hundred years to the earliest settlement of the town. The case, upon the facts, was settled by intelligent commissioners agreed upon by the parties; and many important questions have been argued and heretofore decided by the court, the opinion having been given by our late lamented associate, Mr. Justice Hubbard.

The question was as to the relative rights of the parties to certain portions of flats, as incident or belonging to their respective estates, as owners of land bounding upon salt water. I avoid the term "appurtenant" to their upland, because it might mislead, as land cannot be held as appurtenant to land. It is a right to the fee of the soil, over which the tide ebbs and flows, to which the riparian proprietor has title to low water mark, as such owner, by force of the Massachusetts colony ordinance of 1641, subject to a public easement, for all persons to pass and repass over it with boats and vessels, when covered with water. It is a title of a peculiar character, depending on a principle of law, which seems very simple, as it stands in the quaint language of the old colony ordinance; but it is found to be exceedingly difficult of practical application, in consequence of the vast variety of localities to which it is necessary to apply it. This uncertainty is increased by the difficulty of ascertaining, after a place has been long settled, what were the original and natural lines of high water and low water, and to what extent currents have changed, and the yielding alluvial soil has been formed or washed away by them.

The principles of law, upon which the demandant's title rested, were formerly discussed and decided by this court, as far as they could be, with the knowledge of the facts then

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furnished. It appeared, that a considerable part of the flats belonging originally to the demandant's estate, and to which, had there been no alienation or disseizin, he would have been entitled, had been enclosed and built upon, by wharves or other solid structures, by the tenants or those under whom they claim, or had been exclusively occupied by vessels lying at such wharves, and that such occupation had continued over forty years, and a large part over sixty years. In consequence of this disseizin and lapse of time, whatever might have been the original title of the demandant or his predecessors, as such proprietors of upland, he had lost his remedy to recover them when this action was brought.

But beside and beyond the flats thus occupied by any wharf, or by a permanent and exclusive use for the dockage of vessels, were portions of land over which the tide still ebbed and flowed, and which might or might not belong to the demandant's upland, according as it should be settled, what were the lines of the flats so belonging to his estate. Entering on such land, passing over it with boats and vessels ever so frequently, could amount to no claim of title, or be proof of occupancy, because it was a common right. To be exclusive, it must either be built upon, enclosed, or used exclusively for some permanent purpose, as docking vessels secured to a wharf. In the present case, there had been no union of title or common occupancy of the two estates, no disseizin, no estoppel, no permanent, exclusive possession, nothing to vary or change the rights, which each proprietor originally had to low water mark, in virtue of the colony ordinance, as riparian proprietor. It became necessary, then, to ascertain, whether any of the flats, thus still open and unenclosed, originally belonged to the demandant's estate, or in other words, whether, if a division were now made of the flats, according to the true principles of the colony ordinance, as it has been expounded and applied by judicial decisions, any of the flats thus open and unenclosed, and in controversy between these parties, would have belonged to the estate of the demandant, as riparian proprietor. Under ordinary cir-

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cumstances, it would not have been difficult to decide this question. But it was otherwise here. The adjacent proprietors, on both sides, in ignorance probably of the true lines, had assumed different modes in running their lines, and had run them in various directions, so that lines of conterminous proprietors could not be safely trusted as guides. Add to this, that some of the flats and low grounds had been raised and built upon, so that it became difficult to ascertain the original direction of the shore of the cove, or the lines of low water and high water. Under these circumstances, a skilful surveyor was appointed, by consent of parties, to make a survey of the entire cove, to lay down, according to the best evidence now to be obtained, the ancient lines of high and low water, and the course of the shore, and all other local facts, tending to show what were the flats, which, according to the ordinance and the rules laid down on that subject in the case of *Rust* v. *Boston Mill Corporation*, 6 Pick. 158, and other cases, belonged to the upland estate of the demandant. This has now been done. Upon examination of the report and plans of the surveyor, Mr. Baldwin, the court are satisfied that no part of the open and unenclosed flats demanded in this suit would, upon such original division of the flats, properly belong to the demandant's upland estate, and therefore that judgment must be entered for the tenants.

CHARLES SCUDDER & others *vs.* SAMUEL CROCKER & others.

On the 12th of April, 1837, the two firms of H. L. & Co. and C. & R., (the members of the latter being also members of the former,) severally made assignments under the act of 1836, *c.* 238, to the same assignees, F. B., W. A. F. S. and G. A. C., for the benefit of their respective creditors: The assignment of C. & R. purported to convey all their property, both as partners and as individuals, to be sold and disposed of by the assignees, and the proceeds thereof distributed among all the creditors of C. & R., and the creditors of each of them, and among all who might become their creditors, or the creditors of either of them, by reason of any then existing note, acceptance, indorsement, or liability, and who should become parties to the instrument, in the proportion of their just claims and demands against C. & R., or against C. or R.: This assignment was executed by C. & R., the assign-

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ors, and by the assignees, but not by any of the creditors of C. & R., or of either of them, and nothing was ever done under it by the assignees. On the 27th of December, 1837, the T. I. Co., a corporation consisting of the same individuals who composed the firm of H. L. & Co., which had been incorporated on the 7th o March, 1837, and in which C. & R. were owners of two thirds of the stock, was duly organized: On the 2d of January, 1838, the T. I. Co. purchased of the assignees of H. L. & Co. all the assets, and entered into a contract with the assignees to pay all the debts, of H. L. & Co.: On the 10th of January, 1838, C. & R. addressed a circular to their creditors, requesting an extension, upon certain terms and conditions therein proposed, which being acceded to by the greater number of the creditors, an arrangement was made accordingly for the purpose, by an instrument dated July 1st, 1838, and signed by the creditors between that day and the 22d of March, 1839, and by a conveyance, on the last named day, by C. & R. to trustees named therein, for the benefit of their creditors: The propositions of C. & R. were, that all their creditors, whose demands exceeded $500, should receive the notes of C. & R. therefor, payable in equal sums, in one, two, and three years, from the 1st of July, 1838, with interest annually, and that all other creditors should receive notes of C. & R., payable in equal sums in three, six, and nine months; that C. & R. should be allowed to retain in their own hands and have the free disposal of a certain portion of the property embraced in the assignment of April 12th, 1837, as a capital for going on with their business; and that the residue should be placed in the hands of trustees, as security for the ultimate payment of the notes so to be given: By the instrument of July 1st, 1838, (which was not to take effect, unless all the creditors whose demands exceeded $500, should become parties to it,) the creditors exonerated the trustees under the assignment of April 12th, 1837, from all liability to them by reason thereof, and (C. & R. consenting) appointed F. B., W. A. F. S., and N. C., trustees, to receive and hold the property (specifying the same, together with the estimated value thereof) proposed by C. & R. to be placed in the hands of trustees; and the instrument then provided, that, in case C. & R. should fail to pay their notes in the manner proposed, the property might be sold by the trustees, and the proceeds thereof applied to such payment: The deed of March 22d, 1839, conveyed all the property mentioned in the instrument of July 1st, 1838, (including the shares of C. & R. in the T. I. Co.,) to the trustees and for the purposes therein named and set forth; with a condition, that if C. & R. should pay their creditors, in the manner and at the times agreed upon, and the trustees for their services, the conveyance should be void: In pursuance of the arrangement thus effected, C. & R. made a settlement accordingly with the greater part of their creditors, whose debts exceeded $500, but not with their other creditors: The trustees, at the request of C. & R. and for the purpose of enabling them to pay their first year's notes due July 1st, 1839, released to them certain portions of the trust property, on an understanding with C. & R. that they should place in the hands of the trustees evidence of a payment of notes by them to the amount of the property released: With the proceeds of the property so released, and other funds of their own, C. & R. paid the first year's notes, at maturity, with the exception of four (for the non-payment of which by C. & R., there did not appear to be any particular reason, other than the accidental neglect or delay of the holders in demanding payment), and soon afterwards delivered to the trustees, as vouchers for the property released by them, an equal amount of the notes so taken up: It did not appear, that the trustees were ever called upon to pay any claims not paid by C. & R.; or that any complaint was made to them by any creditor, on account of such non-payment; or that they were ever required by the creditors, or any of them, to take possession and dispose of the trust property, in consequence of non-payment by

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C. & R.: The trustees made no further disposition of the trust property, until February, 1841, after which date, sales were made from time to time under their authority as trustees; and the property was finally disposed of by them, and the proceeds paid to the clerk, in pursuance of an order of the court, passed in August, 1843: On the 7th of December, 1841, proceedings in insolvency were instituted against C. & R. on the application of certain of their creditors, in pursuance of which all their property, both partnership and individual, was taken possession of and assigned, and C. & R. received their certificates of discharge, on the 23d of February, 1843: The plaintiffs brought their bill in equity, on the 4th of April, 1842, against C. & R. and their trustees and assignees, for an account of the property assigned as above mentioned, and a distribution thereof among the creditors of C. & R.: The trustees having answered the bill, and exhibited an account of their receipts and expenditures, and of their proceedings relative to the trust, a decretal order was passed at the November term, 1844, by agreement of the parties, by which the indenture of April 12th, 1837, was adjudged to be inoperative, and the deed of March 22d, 1839, valid and effectual; and by which the cause was referred to a master, to ascertain and report upon the state and amount of the fund in court,—what disposition had been made of the property assigned,—what had been the proceedings of the trustees, and what compensation they ought to receive,—together with the names of the creditors of C. & R. who should prove their claims before him, and the amount due each on account of claims existing on the 12th of April, 1837, "though the evidence of such claim or claims may have changed since that day:" The order also directed the master to ascertain and report, whether any creditor had received from the property conveyed by the deed of March 22d, 1839, more than one third of his demand, as due on the 12th of April, 1837, and, if so, the excess; which excess, the order declared, should be considered a payment *pro tanto* of any dividend, to which such creditor might otherwise be entitled.

The master having made his report with reference to the several matters referred to him, and various exceptions having been taken thereto, it was held:

1. That it was not the effect of the decretal order to give a judicial construction to the deed of March 22d, 1839; but that the order was framed with a view to the ascertaining of such facts, as might enable the court to determine upon the rights of the parties, according to the legal construction, which might subsequently be given to the deed.
2. That the deed of March 22d, 1839, was so far connected with and dependent upon the assignment of April 12th, 1837, that the property conveyed by the former was to be held by the trustees, as security for the payment of the same debts, which were to have been paid under the latter.
3. That the instrument of July 1st, 1838, and the deed of March 22d, 1839, were to be considered as parts of one and the same transaction, and construed together.
4. That the arrangement thus effected was not the creation of a trust fund absolutely appropriated for the payment of the notes to be given by C. & R. in settlement with their creditors; but that such notes were to be paid by C. & R. out of their own funds and means.
5. That payments, by C. & R., of their first instalment notes, from whatever sources the means of making the same might be derived, did not constitute a claim on the fund; and, if made out of the fund, with the consent of the trustees, such payment was a misappropriation, for which the trustees were responsible.
6. That those of the creditors of April 12th, 1837, who had not since received any part of their claims, were not entitled to a preference as to one third, in the distribution of the fund, over other creditors one third of whose claims had been so paid; and that if any creditor had received more than one third of his claim, the

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excess was not to be regarded as a payment *pro tanto*, in advance, of any future dividend to which he might be entitled.

7. That the deed of March 22d, 1839, was a mortgage, defeasible by the payment of their notes, &c., by C. & R., which gave the trustees no power to sell the property thereby conveyed, until after a breach of the condition.
8. That, upon a breach of the condition, the trustees had power to sell the property, and, with the proceeds, to pay the debts; but that they were not bound to sell the same immediately, at its then market value; that they were to exercise a discretion, as to the time and manner of sale; and that, in disposing of the property, they were only answerable for the exercise of good faith and sound judgment.
9. That it did not appear that there was any breach of the condition in July, 1839, or, if there were, that notice of it was given to the trustees.

The T. I. Co., having been allowed by the master to prove as a creditor of C. & R against the fund, it was held:

1. That if H. L. & Co. on the 12th of April, 1837, were indorsers or sureties for C & R., and afterwards paid the debts for which they were so liable, they would thereby become creditors of C. & R. under the assignment of April 12th, 1837.
2. That, by the assignment of the assets of H. L. & Co. to the T. I. Co., the latter took an equitable title thereto, with all the immunities, privileges and benefits, to which the same were entitled, and subject to the charges, equities, rights of set-off, and counter claims, to which they were subject, in the hands of the assignees of H. L. & Co.
3. That, under the peculiar circumstances of the case, if the T. I. Co., as the successor and assignee of H. L. & Co., had any claims, either legal or equitable, as a creditor of C. & R., under the provisions of the trust deed, it was no objection to its being allowed to prove as such, that C. & R. were members of the firm of H. L. & Co., and also shareholders in the T. I. Co.

The T. I. Co. having been allowed to prove, before the master, as a creditor of C. & R., within the terms of the decretal order, for payments of notes signed or indorsed by H. L. & Co., or by the T. I. Co. as their successor and assignee, to which notes C. & R. were also parties, either as promisors or indorsers, it was held:

1. That, if, on any of the notes so taken up by the T. I. Co., H. L. & Co. were in fact the principal debtors, and C. & R. sureties, such payments were not provable against the fund.
2. That, if, on any such notes, which were in existence on the 12th of April, 1837, C. & R. were, in fact, the principal debtors, and H. L. & Co. sureties, and such notes remained specifically, and were paid by the T. I. Co. as debts of H. L. & Co., such payments were provable against the fund.
3. That, if any such notes, which were in existence on the 12th of April, 1837, on which C. & R. were principal debtors, and H. L. & Co. sureties, had been taken up by the former, by giving their own notes therefor, with the indorsement or signature of the T. I. Co., in place of the preëxisting indorsement or suretyship of H. L. & Co., and the last mentioned notes were paid by the T. I. Co., such payments were a new credit, by the T. I. Co. to C. & R., and, consequently, not provable against the fund.

The T. I. Co. having been allowed to prove, on account of payments made from its funds, to discharge debts of C. & R. existing on the 12th of April, 1837, it was held, that if the credit of the T. I. Co. had been loaned by its officers to C. & R. in the form of indorsements which were used by C. & R. for the payment of such

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debts, and the T. I. Co. paid the notes so indorsed, such payments creat d a new debt from C. & R. to the T. I. Co. without giving the latter any claim, legal or equitable, by way of substitution, against the fund.

The T. I. Co. having been allowed to prove for a balance of account, which was due from C. & R. to H. L. & Co. on the 12th of April, 1837, and had been carried forward on the books of H. L. & Co., and of the T. I. Co.., and included as the first item of debit in four several accounts rendered by the T. I. Co. to C. & R. from the 30th of April, 1838, to the 30th of April, 1841; it was held, that this balance was provable against the fund, unless it had been paid or liquidated, since the original entry thereof, by means of subsequent dealings and transactions between the parties; and that charging the same in a new account of a subsequent date, or the rendering of such an account, was not such a liquidation; but that if subsequent dealings and transactions had taken place between the parties in the course of which new credits were given, and debts made, new accounts were stated and rendered, and the balance carried from time to time to new account, and the aggregate of the payments, on general account, in such subsequent transactions, without or beyond any specific appropriation or application thereof, exceeded the balance so debited and claimed, the same must be considered as thereby liquidated and absorbed.

The T. I. Co. claimed before the master, as a debt due from C. & R. to H. L. & Co., a sum of money, taken by the common assignees on the 3d of November, 1837, from the assets of H. L. & Co., and appropriated by them to pay a debt of C. & R., for the purpose of preventing the sale and consequent sacrifice of certain stock belonging to the assets of C. & R., which was pledged as collateral security for the debt so paid; and it appearing, that, for the purpose of raising money for the use of C. & R., a new debt was immediately contracted, in favor of the same creditor, by whom the stock continued to be held as collateral security therefor, and that the stock was never redeemed, but ultimately sold by the holder, for a price less than the debt for which it was pledged, it was held, that this was not a debt provable against the fund.

The trustees, in their answer, claiming to be discharged from further accounting for certain items of property included in the trust deed, on the ground, that the same, not having been delivered to them at the time of the conveyance, had never since come into or been placed in their hands, it was held:

1. That as to certain shares in the T. M. Co. which were pledged as collateral security for a debt of C. & R., and, not having been redeemed by them, were subsequently sold for less than the sum for which they were pledged, the trustees were no further answerable.

2. That, as to certain shares in the C. Bank, which were pledged as collateral security for a debt of C. & R. to the bank, but which were recognized and treated by the bank as the property of C. & R., to whom the dividends were paid, by whose direction the shares were subsequently sold and transferred, and by whom the proceeds, after payment of the debt to the bank, were appropriated to their own use and in part to the payment of a debt existing on the 12th of April, 1837, the trustees were accountable, notwithstanding the shares did not stand in the names of C. & R.; it not appearing, that the trustees could not, at any time, have caused the shares to be disposed of, and have appropriated the proceeds, after payment of the bank, to the purposes of the trust.

3. That, as to the interest of C. & R. in certain shares of the W. I. Co., being the amount paid by C. & R. towards their subscription for the same, (no certificates thereof having then been issued, but which, when issued, were to be delivered to the trustees,) which interest was afterwards sold by C. & R. at an advance the

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trustees were accountable; it not appearing, that they had ever applied for the certificates, or had given notice to the company of the conveyance to them, or taken any measures to avail themselves of C. & R.'s interest in the shares.

The trustees, in their account, claimed an allowance for certain shares in the B. P. W., included in the trust deed, which, as they alleged, had since become of no value, and in reference to which it appeared, that in 1838 the shares began to depreciate,—that in 1839 and afterwards they could not be sold at all,—that in 1839 the corporation was insolvent,—and that in 1841 an assessment was laid on the shareholders, to meet the liabilities of the corporation: it was held, that the trustees were entitled to the allowance claimed.

The trustees made a like claim as to certain shares in the T. I. Co., which had not been salable for some years, in consequence of the stockholders having become personally responsible for debts and liabilities, by reason of a neglect to comply with the laws relating to manufacturing corporations: it was held, that the trustees were entitled to such allowance.

The trustees, in their account, claimed to discharge themselves from further accounting for certain portions of the trust property, which they had released to C. & R., in order to enable them, with the proceeds thereof, to pay their first year's notes, by crediting themselves with and producing a number of the first year's notes, which had been taken up by C. & R. equal in amount to the sum with which the trustees had charged themselves, as vouchers for the value of the property so released: it was held, that the trustees were not authorized to dispose of the trust property in the manner and for the purpose stated, and that they were bound to account therefor.

The trustees claimed compensation for their services under the assignment of April 12th, 1837: it was held, that they were not entitled thereto out of the fund.

The trustees claimed, as a compensation for their services, in making sales, &c., under the trust deed, and for making sales of property in pursuance of the order of court, a commission of five per cent, amounting to $6438·80, on the whole amount of sales, namely, $128,766·28: the sum claimed was held to be unreasonably large, and the sum of $5000 substituted therefor.

This was a bill in equity, brought by Charles Scudder, Thomas F. Cordis and David W. Horton, a firm doing business under the name and style of Scudder, Cordis and company, in behalf of themselves and all other creditors of Samuel Crocker and Charles Richmond, late partners in business under the firm and style of Crocker and Richmond, against the said Samuel Crocker and Charles Richmond, and certain persons, their assignees and trustees, named Francis Baylies, William A. F. Sproat, George A. Crocker, Nathaniel Crandell, (since deceased,) Charles J. Holmes, and Lovett Morse.

The subject of the bill, and the subsequent proceedings thereon, which gave rise to the questions before the court, will appear from the following statement.

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The first named defendants, Samuel Crocker and Charles Richmond, for some time previous to the 12th of April, 1837, had been engaged in extensive business in Taunton, as partners, under the firm and style of Crocker and Richmond. Finding themselves embarrassed and unable to meet the demands against them, they, on that day, undertook to make an assignment of all their property, both joint and individual, for the benefit of their creditors, according to the provisions of the act of 1836, *c.* 238, "to regulate the assignment and distribution of the property of insolvent debtors." In order to effect this object, an indenture of three parts, by and between Crocker and Richmond, of the first part, three of the other defendants, Baylies, Sproat and George A. Crocker, of the second part, and the various persons, creditors of Crocker and Richmond, who should become parties thereto, of the third part, was executed by the parties of the first and second part, on the 12th of April, 1837.

This indenture purported to convey and assign all the property and estate, of every description, (a schedule of which was to be afterwards made out,) belonging to Crocker and Richmond, either as partners or as individuals, to the assignees, Baylies, Sproat and Crocker, in trust, to be sold and disposed of, and the proceeds thereof, after payment of the expenses, and a "just compensation to the trustees, for their services and responsibility in the premises," to be distributed among the creditors of the assignors. The clause relating to the distribution was in the following terms:

"The residue, &c., the said party of the second part shall pay and legally distribute to and among all the creditors of the said firm of Crocker and Richmond, and Samuel Crocker and Charles Richmond, and all who may become their creditors, or the creditors of either of them, by reason of any now existing note, acceptance, indorsement, or liability for them, and who shall become parties to this instrument, in the proportion of their just claims and demands against the said firm of Crocker and Richmond, or against the said Samuel Crocker or Charles Richmond."

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This instrument was not executed by any of the creditors of Crocker and Richmond, and nothing was ever done under it by the trustees; but the property covered by it remained in the hands of the assignors, and under their control and management, as before.

At the same time with this assignment, another firm established in Taunton, under the name and style of Horatio Leonard and company, of which Crocker and Richmond were members, also made a similar assignment, for the benefit of creditors, to the same trustees. Subsequently, the members of the firm of Horatio Leonard and company were incorporated as the Taunton Iron Company, and in that character became the purchasers of the assets, under an obligation to pay the debts, of Horatio Leonard and company, as will be more fully stated in another part of the case.

This continued to be the situation of the affairs of Crocker and Richmond, until the 10th of January, 1838, when they addressed a circular letter to their creditors, making certain statements and propositions, relative to their affairs and to the payment of their debts. In this paper, Crocker and Richmond represented to their creditors, that, in consequence of the general depression of business then prevailing, which rendered the collection of debts difficult, and the disposition of their property impracticable, except at ruinous prices, they had been unable to liquidate their debts and resume business as they had expected. They proposed to their creditors, therefore, to allow them further time for payment, by receiving their notes, payable by equal instalments in one, two and three years, with interest annually, for all debts, which, with the interest thereon, on the 1st of July then next, should exceed $500, and for all debts which should then fall short of that sum, notes payable in like manner in three, six and nine months. To secure the ultimate payment of the notes thus to be given, which they estimated would amount to $380,000, they proposed to place in the hands of trustees certain enumerated articles of property, estimated at $665,878·75, and to retain in their own hands, relieved

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from the incumbrance of the assignment above mentioned, and as a capital for going on with their business, and meeting their engagements under this arrangement, certain other property estimated at $304,724·48.

These propositions being generally acceded to by the creditors, the arrangement proposed was carried into effect by means of an instrument dated July 1st, 1838, and executed by most of the creditors between that day and the 22d of March following, and a deed of the latter date from Crocker and Richmond to Baylies and Sproat, two of the former trustees, and Nathaniel Crandell, one of the defendants, as trustees.

By the first named instrument, the creditors, after a recita of the propositions of Crocker and Richmond and their acceptance thereof, fully and unconditionally discharged and exonerated the assignees under the indenture of April 12th, 1837, from all liability to them as such, and authorized, constituted and appointed Baylies, Sproat and Crandell (provided Crocker and Richmond should consent and unite therein), to act as trustees to receive and hold the property proposed by Crocker and Richmond to be placed in the hands of trustees for the benefit of their creditors. The instrument then proceeded to enumerate the several items of property alluded to, together with the estimated value thereof, and concluded in these terms:

"That, in case the said Crocker and Richmond should fail to pay their several debts in the manner proposed, the said property may be sold, and the proceeds of the sale applied to that purpose, giving them, the said trustees, full authority to do the same, and to make and execute all the legal and necessary instruments to constitute them trustees as aforesaid, and to enable them to execute the said trusts, provided all the creditors, whose claims shall exceed $500, shall become parties to this instrument."

By the deed from Crocker and Richmond to Baylies, Sproat and Crandell, dated March 22d, 1839, the grantors conveyed all and singular the property mentioned in the instrument

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above described, (with one or two exceptions,) to the grantees therein named, and the survivors or survivor of them, to be held in trust for the purposes of the agreement between Crocker and Richmond and their creditors, recited in the said instrument, namely: "for securing the payment of the several notes of hand, which they should give in pursuance of said agreement, payable in equal sums for all debts, obligations, and demands, exceeding five hundred dollars, in one, two and three years, from the first day of July now last past, with interest, and for all debts, obligations and demands of a less amount than five hundred dollars, their notes payable in equal sums, in three, six and nine months from the said first day of July, and interest."

This deed contained and concluded with the following clause:

"Now, therefore, if we, the said Samuel Crocker and Charles Richmond, our heirs, executors or administrators, shall well and truly pay to our several creditors the full and just amount of their debts, in the manner and on the days above mentioned, and otherwise faithfully comply with the terms of our several agreements, as above mentioned, and pay to them, the said trustees, their survivors or survivor, as aforesaid, a just and reasonable compensation for their services and expenditures, in executing said trust, then and in that case this deed to be void, otherwise to remain in full force and virtue."

On the day of the execution of this deed, the grantees therein, Baylies, Sproat and Crandell, signed a paper certifying to the creditors, that all the real and personal estate (enumerating the same), which Crocker and Richmond had agreed to convey for the benefit of their creditors, had been conveyed to, and placed in the hands of, the grantees.

In pursuance of the arrangement thus entered into, Crocker and Richmond effected a settlement with the most of their creditors whose demands exceeded $500, by giving their notes therefor, dated July 1st, 1838, and payable in one, two and three years, with interest annually. No notes appear to

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have been given in settlement of the demands of $500, and under, as was also stipulated in the agreement.

The trustees held the property thus conveyed to them, without making any sale or other disposition of any part thereof, until a short time previous to the 1st of July, 1839, when the first year's notes, or the first instalment notes, as they were called, became due. When the time for this payment was approaching, Crocker and Richmond applied to the trustees to release to them a part of the property in their hands, in order to enable the former to meet the payment of this instalment. The trustees acceded to the request, and accordingly released to Crocker and Richmond eighty-one shares in the stock of the Taunton Branch Railroad Company, valued at $7614, and sixty shares in the stock of the Taunton Iron Company, valued at $60,000, with the proceeds of which and funds of their own, Crocker and Richmond paid the first year's notes amounting to $100,000, and upwards; being all the notes then due, with the exception of four, which were afterwards paid by the trustees, but, for the non-payment of which by Crocker and Richmond, there did not appear to be any particular reason, other than the accidental neglect or delay of the creditors in demanding payment. This relinquishment was made by the trustees, upon the understanding that Crocker and Richmond should place in their hands evidence that they had paid notes, which had been given according to the terms of the trust deed, to an amount equal to the value of the property so released.

No further sale or disposition of the property was made by the trustees, until February, 1841, from which time until the close of the year 1843, sales were made to about the amount of $20,000. The residue of the property, remaining in their hands, was sold by the trustees under a decree of this court, made in the present cause on the 18th of August, 1843, and the proceeds thereof were paid into the hands of the clerk.

On the 1st of April, 1841, Crocker and Richmond made a further deed to Baylies, Sproat and Crandell, by which they confirmed their former conveyance of March 22d, 1839, and explained and enlarged the powers thereby conferred.

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On the 7th of December, 1841, certain creditors of Crocker and Richmond made an application to the judge of probate for the county of Bristol, praying that proceedings in insolvency might be instituted against them. The application was allowed by the judge, and a warrant was accordingly issued on the same day, upon which possession was taken by a messenger of all the property of the debtors, both partnership and individual. A meeting of the creditors was subsequently held, at which the defendants, Charles J. Holmes and Lovett Morse, were chosen assignees, and the judge of probate thereupon conveyed to them all the property of the insolvents. In pursuance of these proceedings, Crocker and Richmond received certificates of discharge from all their debts, partnership as well as individual, on the 23d of February, 1843. Those of the creditors, who proved their demands against Crocker, were paid thereon a dividend of twenty per cent.

The bill in this cause was filed on the 4th of April, 1842. As originally drawn, it prayed for an account of the property, which was assigned by the indenture of April 12th, 1837, and a distribution thereof to and among the creditors of Crocker and Richmond, according to the provisions of the act of 1836, c. 238. The defendants filed answers setting forth, in substance, the facts already stated. The plaintiffs then amended the bill, so as to present their claim to an account and distribution, in the alternative, namely, either under the indenture of April 12th, 1837, or under the arrangement which was completed by the deed of March 22d, 1839, according as the court should adjudge them to be entitled.

The amended bill was demurred to by George A. Crocker, for multifariousness; and Baylies and Sproat moved, that the plaintiffs should be required to elect on which ground they would proceed, namely, on the indenture of April 12th, 1837, or the arrangement of March 22d, 1839. The court overruled the demurrer, and disallowed the motion; and the defendants thereupon answered the bill. In their answers, the defendants set forth the transactions between Crocker and Richmond, and their assignees and trustees, and the proceedings of the

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latter relative to the property in their hands, together with their accounts of sales of the same, and of their disbursements, expenses and commissions.

At the November term, 1844, by the consent and agreement of the parties, the court passed a decretal order in the cause, the material parts of which, necessary to be here stated, are as follows:

It was, in the first place, ordered, adjudged and decreed thereby, that the indenture of April 12th, 1837, had become and was inoperative and no longer in force; that the deed of March 22d, 1839, was valid and effectual to convey the property therein mentioned, to the parties and for the purposes stated in the same, and that the trustees were bound to account for such property, in this suit, to the plaintiffs and all other persons and corporations, who should become parties thereto, and who were creditors of Crocker and Richmond on the 12th of April, 1837; and that the deed of April 1st, 1841, was valid and confirmatory of the deed of March 22d, 1839.

It was then further ordered and decreed thereby, that the cause, with the bill, answers, orders and proofs therein, be referred to George S. Hillard, Esquire, one of the masters in chancery for the county of Suffolk:

1. To ascertain and report upon the state and amount of the funds, deposited in the hands of the clerk, by order of the court, in this cause, and who is entitled to the same.

2. To ascertain and report what has become of the property conveyed by the deed of March 22d, 1839; whether the same has been accounted for according to the provisions of the deed, or of any order of the court; and, if any part of the same remain unaccounted for, what it is, why it has not been disposed of, and who is accountable therefor; whether the trustees have diligently and faithfully performed the duties undertaken by them in accepting the trust; and what sum, if any, should be allowed them for their services and disbursements in the execution thereof.

3. To ascertain and report what sums were due from the defendants, Crocker and Richmond, to the plaintiffs in this

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suit, on account of any claim or claims existing on the 12th of April, 1837; and to give notice, as specified in the order, to all persons and corporations, who were creditors of Crocker and Richmond, on account of any claim existing on the 12th of April, 1837, to come before the master, and prove their demands, on or before a day to be fixed by him, on pain, if they should neglect to do so, of being wholly excluded from participating in the trust fund created by the deed of March 22d, 1839.

4. To ascertain and report the names and give a description of all the creditors of Crocker and Richmond, who should come in and prove their claims, as aforesaid, and the amount due each, respectively, on account of such claims as existed on the 12th of April, 1837, "though the evidence of such claim or claims may have been changed since" that day.

5. To inquire and report whether any and which of the creditors are secured by a pledge or mortgage, and, if so, what is the value of the security in each case; to deduct such value from the amount of the debt so secured, and to report the balance only as a claim against the fund.

6. To inquire and report whether any and what creditors have received, from the property conveyed in trust by the deed of March 22d, 1839, more than one third of the amount of their several demands, as the same existed on the 12th of April, 1837, (that being the proportion supposed to have been subsequently paid to the creditors according to the arrangement completed by the deed aforesaid); such excess to be considered as a payment, *pro tanto*, of any dividends, to which the creditors receiving the same might otherwise be entitled.

In pursuance of this order, the master proceeded to the discharge of his duties under the same, and passed upon the claims of a great number of creditors, which were offered for proof before him, and upon the proceedings and accounts of the trustees, and made his report upon the several matters so submitted to him, on the 19th of June, 1847. Several of the claims made before the master, and adjudicated upon by him,

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having been contested at the hearing, on various grounds, the master, at the request of the parties, inserted a statement of the facts relating to such contested claims, together with his decision thereon, in his report.

The plaintiffs, for themselves and the creditors generally, filed exceptions to the report, on the ground of the allowance by the master of the claims of certain creditors therein specified, and of the allowance of certain particulars in the accounts and proceedings of the trustees; certain creditors, whose claims were allowed in part, filed exceptions because their claims were not allowed in full; and the trustees filed exceptions, on the ground, that certain charges contained in their accounts against the fund were disallowed by the master.

The various claims and accounts, which were the subjects of controversy before the master, and of the exceptions taken to his report, together with the facts relating thereto, so far as the same are material to be here stated, and as they appear from the master's report, and other documents in the cause, are as follows.

The assignees of the Taunton Iron Company presented an account, consisting of a great number and variety of particulars, most of which were proved before the master and allowed by him against the fund. Some of the claims offered for proof by the same claimants were disallowed in part and others rejected altogether.

In reference to these claims, generally, it appeared before the master, that, previous to the 12th of April, 1837, the two commercial houses of Crocker and Richmond, and Horatio Leonard and company, the latter engaged in the iron business as manufacturers and dealers, and the former in general commerce, were established and doing business in Taunton; that Crocker and Richmond were at the same time partners in the firm of Horatio Leonard and company, the other members of which were Horatio Leonard, George Leonard, Charles Robinson, I. Robinson and E. Robinson; that, on the 12th of April, 1837, both these firms failed, and assigned their property for the benefit of creditors, pursuant to the act of

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1836, *c.* 238, to the same assignees, Baylies, Sproat and George A. Crocker, three of the defendants in this cause; that, on the 7th of March, 1837, the members of the firm of Horatio Leonard and company were incorporated as the Taunton Iron Company, which was duly organized on the 27th of December, 1837; that, on the 2d of January, 1838, the Taunton Iron Company purchased of the assignees of Horatio Leonard and company all the assets of that firm, and, at the same time, entered into a contract with the assignees to pay all their debts, which contract had been performed, and the debts paid accordingly. The whole number of shares in the Taunton Iron Company was three hundred, two hundred of which were the property of Crocker and Richmond.

The master, in his report, distributed the several claims offered for proof by the assignees of the Taunton Iron Company into five classes.

1. The first class consisted of payments made by the Taunton Iron Company, subsequent to the 12th of April, 1837, of negotiable securities originally signed by Crocker and Richmond, and indorsed by Horatio Leonard and company, or *vice versa;* which indorsements or signatures were made by Horatio Leonard and company on account of Crocker and Richmond, and for their benefit; and the original securities represented claims which would have been provable against the fund.

It appeared, that, in various instances, the notes and acceptances of the Taunton Iron Company were used, in the manner and under the circumstances mentioned in relation to the next class of claims, to take up the securities thus indorsed by Horatio Leonard and company; that the amounts of such securities, when ultimately paid by the Taunton Iron Company, were entered to the credit thereof, and to the debit of Crocker and Richmond, in the books of the parties, respectively; that, in several instances, the original securities thus taken up were produced by the assignees of the Taunton Iron Company, from the files of Crocker and Richmond; that, in one or more cases, the notes and acceptances of the Taunton

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Iron Company, which had been used to take up the original securities indorsed by Horatio Leonard and company, had since been paid by the assignees of the Taunton Iron Company; and that, in making such payments, a compromise had been claimed and submitted to by the holders, on the ground of a doubt, whether the notes and acceptances of the Taunton Iron Company, thus used, were binding on that corporation.

Upon all the facts, relating to this class of claims, the master was of opinion, that Horatio Leonard and company were originally sureties of Crocker and Richmond; that the Taunton Iron Company, having taken up the securities so indorsed by Horatio Leonard and company, was entitled to be substituted or subrogated to all the rights of the holders of such securities; and, as the holders thereof would have had a right to prove the same as claims against the fund, that this class of claims ought to be allowed.

2. The second class of claims embraced certain payments, made from the funds of the Taunton Iron Company, to discharge debts due from Crocker and Richmond of a date anterior to April 12th, 1837, and in reference to which the Taunton Iron Company claimed a right of substitution.

The material facts, respecting this class of claims, were, that Crocker, of the firm of Crocker and Richmond, was president of the Taunton Iron Company, and, as such, authorized to sign and indorse the paper of the company at his discretion, and that he also had the general management and control of all the affairs of the company; that Robinson, the treasurer of the Taunton Iron Company, was accustomed to sign the company's notes, and leave them at the counting room of Crocker and Richmond, and these notes were frequently applied to pay the debts of Crocker and Richmond; that, in such cases, the notes so used were not always credited to the Taunton Iron Company, but, in general, a memorandum was made in the bill book of Crocker and Richmond, that the notes given were the Taunton Iron Company's, and that Crocker and Richmond must provide for them; that the same person acted as book-keeper to both Crocker and Rich-

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mond, and the Taunton Iron Company, so far as related to that part of the business of the latter, which was transacted at the counting room of the former, and it was only by his evidence, and that of the books of Crocker and Richmond, that the several appropriations in question could be traced; that, upon the books of the Taunton Iron Company, these appropriations were merely debited as charges to Crocker and Richmond, without reference to the appropriation of the several items; that when the notes of the Taunton Iron Company were appropriated in this manner, the fact was generally made known to the treasurer, either at the time, or afterwards; and that such appropriations were made with perfectly good intentions, the firm of Crocker and Richmond being supposed to be solvent. These appropriations were made prior to the early part of the year 1841.

The creditors of Crocker and Richmond, whose debts were thus alleged to have been paid by an application of the funds of the Taunton Iron Company, were creditors before the 12th of April, 1837, and their claims were consequently provable against the fund.

On the part of the plaintiffs, it was urged, that these transactions constituted a mere loan of money from the Taunton Iron Company to Crocker and Richmond, which created a new debt; that they so appeared on the books of the company; that it would be unjust to revive old debts which had been extinguished by payment; and that the Taunton Iron Company, in reference to these claims, could only stand on the footing of a general creditor.

On the other hand, it was contended, that Crocker and Richmond had used the funds of the Taunton Iron Company, without authority, to pay their own debts, and that in equity they became holders of the paper thus taken up and discharged, in trust, for the Taunton Iron Company, whose funds had been so applied, and that the company had a right to be substituted in the place of the original holders.

The master adopted the latter as the most equitable view, and admitted this class of claims.

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3. The third class consisted of a single item of claim, amounting to $70,879·14.

This was the first item on the debit side of the Taunton Iron Company's account, filed before the master; on which it was entered as a "balance of account," under date of April 15th, 1837. The amount was actually due from Crocker and Richmond to Horatio Leonard and company, on the 12th of April, 1837, but the balance was not struck until three days afterwards.

It was contended, before the master, that the assignees of Horatio Leonard and company were trustees of the creditors of that firm, and sold their assets on the account and for the benefit of the creditors; that the Taunton Iron Company could have no other claim than that of their assignors, and, consequently, that the claim in question was virtually a claim on behalf of the creditors of Horatio Leonard and company, and must be postponed to the claims of the creditors of Crocker and Richmond.

It was further contended, that the Taunton Iron Company had charged this item in account, and that Crocker and Richmond had assented to it, as a debt due to the company from them; and that it consequently became a new debt to the Taunton Iron Company, at the time of the assignment in January, 1838, and that the original debt to Horatio Leonard and company was thereby discharged.

In proof of this, four several accounts transcribed from the books of the Taunton Iron Company were introduced, showing the transactions between the Taunton Iron Company and Crocker and Richmond, from the 30th of April, 1838, to the 30th of April, 1841, in which this item was the first item of debit; and it was contended, that the first item of credit should be applied in discharge of it.

On the other hand, it appeared, that there was no transfer of this item of charge from the books of Horatio Leonard and company to those of the Taunton Iron Company, but that the books of the former were used by the latter, who had no other books; that this charge was upon these books

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at the time of the transfer, and, in copying the entries, this item was included; and that the same person acted as book-keeper to Horatio Leonard and company and to the Taunton Iron Company.

It also appeared, that nearly a year after the account between the parties, which was relied upon, had been running, namely, on the 22d of March, 1839, the Taunton Iron Company became a party to the deed then made by Crocker and Richmond for the benefit of their creditors; and there was no evidence, that the Taunton Iron Company had any other claim of a date prior to the 12th of April, 1837, or that there was any other ground than the item in question for its becoming a party to that instrument. The Taunton Iron Company was also one of the creditors, to whom Crocker and Richmond addressed a circular letter, preliminary to the deed of March 22d, 1839.

Upon the facts and evidence above stated, the master admitted this claim.

It was further contended, before the master, on behalf of the plaintiffs, that the Taunton Iron Company had received more than one third of the amount of this item, from the property held in trust, under the deed of March 22d, 1839. The ground, upon which this claim was put, was, that a dividend of two hundred dollars on a share, on two hundred shares of the capital stock of the Taunton Iron Company, amounting to $40,000, had been credited under date of March 19th, 1844, in the account of the Taunton Iron Company with Crocker and Richmond, rendered on the 30th of April, 1840, and that this dividend, being derived from the property constituting the trust fund, must be regarded as a payment out of the same, and could not be considered as a general credit.

It appeared, that sixty of these two hundred shares had been released by the trustees to Crocker and Richmond, previous to March 19th, 1840, the date of the credit, in order to enable them to pay their first year's notes, which came due on the 1st of July, 1838. The master was of opinion, that it was to be presumed, that these shares had been released in

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virtue of the condition in the trust deed of March 22d, 1839, in consideration of the payment, by Crocker and Richmond, of so much of their debts, as was equivalent in amount to the value of these shares; and, consequently, that so far as these shares were concerned, there was no payment to the Taunton Iron Company out of the trust fund.

As to the dividend on the remaining one hundred and forty shares, the master was of opinion, that the trust deed was to be treated as an equitable mortgage; that the rents and profits of the property thereby conveyed remained subject to the control of the mortgagors, Crocker and Richmond; and, consequently, that the crediting of this dividend was a payment by them on account, and not a payment by the trustees, or out of the trust fund.

4. The fourth class comprised a single charge of $8500, of which the Taunton Iron Company claimed payment in full, as a preferred debt. The facts relating to this claim were substantially as follows:

On the 2d of November, 1837, Crocker and Richmond were indebted to Otis and Mason of New York, in the sum of $8500, on two acceptances, for which eighty-four shares in the stock of the Taunton Manufacturing Company were pledged as collateral security; and, at the same time, Willett and company of New York had in their hands a considerable amount of funds belonging to Horatio Leonard and company.

At this time, Sproat, one of the assignees of Horatio Leonard and company, and also of Crocker and Richmond, being in New York with Richmond, the latter, with the knowledge and consent of Sproat, took the funds in the hands of Willett and company and applied them to the payment of the debt to Otis and Mason.

At the same time, other drafts of equal amount, namely, $8500, were drawn by the assignees of Crocker and Richmond upon Otis and Mason, and were accepted by them; they continuing as before to hold the stock of the Taunton Manufacturing Company as collateral security for their acceptances.

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It was stated in evidence, by Sproat, that these drafts were discounted, and the proceeds applied, for the benefit of the estate of Crocker and Richmond, in the hands of their assignees, though he was unable to state the particular application. It further appeared, that when the acceptances became due, they were paid by Willard and West, and the shares above mentioned were then transferred to them, as collateral security, by Otis and Mason. This stock was subsequently sold by the surviving partner of Willard and West, in 1842, for about four thousand dollars.

The day after the transactions above mentioned at New York, entries thereof were made in the books of the assignees of Crocker and Richmond, and of Horatio Leonard and company, as of a debt from the former to the latter.

The object of Sproat, as testified to by him, in thus applying the funds of Horatio Leonard and company, was to prevent a threatened sale of the stock held as collateral security by Otis and Mason; which was considered to be valuable and worth much more than it was pledged for, and which would have been sacrificed if it had then been sold. This stock, in the circular letter of Crocker and Richmond, to their creditors, preliminary to the arrangement of March, 1839, was valued at $58,906·25; and in the schedule of property conveyed by the trust deed, it was described as eighty-four shares in the stock of the Taunton Manufacturing Company, "now in the hands and possession of George L. Willard, surviving partner of the late Willard and West, to be transferred to the said trustees, on the adjustment of claims between us, the said Crocker and Richmond, and the late firm of Willard and West."

The master rejected the claim, both as a preferred debt, and as a debt entitled to a dividend.

5. The fifth and last class of claims comprised notes of Crocker and Richmond, indorsed by the Taunton Iron Company, given in payment of debts due prior to April 12th, 1837. which the assignees of the Taunton Iron Company had paid, and which they then held and produced before the master as vouchers.

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These claims were admitted.

Among the claims, proved before the master by the assignees of the Taunton Iron Company, there were several of which no part had been paid since the 12th of April, 1837; and, in reference to these claims, it was contended by the claimants, that, to the extent of one third part of each of these claims, they were entitled to a preference, in the distribution of the assets, over those creditors, one third part of whose claims had been paid since April 12th, 1837. The master disallowed this claim.

William Rotch, Jr., presented a claim, founded on a note of hand, dated July 10th, 1834, and signed by Crocker and Richmond, in their individual names, by which they jointly and severally promised to pay him or his order nine thousand dollars. This note had been renewed by the promisors, by a memorandum thereon in writing, signed by them individually, bearing date the 22d of January, 1840. Payments of principal and interest were indorsed on the same, under dates of July 4th, 1835, July 9th, 1836, and January 10th, 1840; and the claim having been proved against the individual estate of Crocker, on the 31st of December, 1841, a dividend of twenty per cent had been received thereon.

The note was offered to be proved for the balance against the fund in court; and there was evidence before the master, that it was given for a consideration which accrued to the firm, and that it was intended to be, and was in fact, the note of the firm.

It appeared, from the indorsements, that no part of the debt had been paid or satisfied since the 12th of April, 1837; and the claimant thereupon contended, that, as to one third part, he was entitled to a preference over such of the other creditors, as had received one third part of their claims, since that time, in virtue of the arrangement of March 22d, 1839.

The master allowed the claim as a general one, but rejected the demand of priority.

The master was directed by the decretal order, among other things, to inquire and report what had become of the property

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conveyed to the trustees, by the deed of March 22d, 1839;—whether the trustees had faithfully performed their duty as such;—and what compensation should be allowed them for their services and disbursements.

The proceedings of the trustees, as appearing from their answer to the bill, and the documents appended thereto, are thus stated in substance by the master.

By virtue of the arrangement between Crocker and Richmond and their creditors, which was completed by the conveyance of March 22d, 1839, and the receipt or certificate of the same date, already referred to (see page 332), their whole property was divided into two parts. One of these parts, consisting of personal property, of the estimated value of $300,000, and upwards, was left in the hands of Crocker and Richmond, as a fund or capital to enable them to continue their business. The remainder of the partnership property, including real estate, stocks, patent rights, &c., of the estimated value of $600,000, and upwards, was put into the hands of the trustees, Baylies, Sproat and Crandell, in trust, to secure the payment of such persons as were creditors of Crocker and Richmond, previous to April 12th, 1837, with a condition, which has already been stated at length (see page 332), that the conveyance to the trustees should become void, if the debts of Crocker and Richmond should be paid according to the agreement made by them with their creditors.

In pursuance of the arrangement alluded to, a large proportion of the creditors of Crocker and Richmond, who were such on the 12th of April, 1837, and whose debts exceeded $500, in amount, gave up their original evidences of debt, and, in place thereof, received Crocker and Richmond's notes for the amounts severally due them, payable by equal portions in one, two and three years from the 1st of July, 1838. It was a part of the arrangement, that those of the creditors, whose debts did not exceed $500, should receive Crocker and Richmond's notes therefor, payable in three, six and nine months. No such notes, however, were in fact given; but, in some cases, debts of that description were paid by an

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arrangement between Crocker and Richmond and the creditors, and many of them remained unpaid.

The first year's notes, given by Crocker and Richmond, as above mentioned, became due on the 1st of July, 1839, and were paid in part, as already stated (page 333), by Crocker and Richmond, out of the proceeds of trust property released to them by the trustees for that purpose.

In the course of a month or six weeks after the payment of the first instalment notes, the book-keeper of Crocker and Richmond, with their knowledge and approbation, selected from their files thirty-two of the notes, which had thus been paid, and delivered them to the trustees, by whom they were produced before the master as vouchers for the property released by them. The amount of these notes corresponded very nearly with the estimated value of the property released. In making the selection, it was not attempted to pick out the particular notes, which had been paid by the property released, but only to take an equal amount.

Among the notes thus produced by the assignees, as representing the property released, were two, which the Taunton Iron Company alleged to have been paid, in part, from their funds, and on account of which they claimed against the fund in court. These claims of the Taunton Iron Company were included in the second class already considered.

There were several creditors of the date of April 12th, 1837, who, for some unexplained reason, had not changed their original securities for new notes payable in one, two and three years, but proved them before the master. In general, creditors of this description did not receive one third of their claims in July, 1839; some had not been paid at all; and others had received small sums or proportions of their claims. No general rule was adopted in regard to the payment of these creditors; there was no apprehension among them, that they should not eventually be paid; some of them had partial security for their debts; and there was a very general expectation, that Crocker and Richmond would work through their difficulties. It did not appear, that Crocker and Richmond

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were pressed for payment, or that the trustees were called upon, in any case, to make payment of claims not paid by Crocker and Richmond, or that any complaint was made to them of such non-payment, or that they were called upon by any of the creditors of Crocker and Richmond to take possession and dispose of the trust property, in consequence of the non-payment of any claim by Crocker and Richmond.

All the creditors, who did not receive one third of their debts in July, 1839, claimed before the master to have priority to that extent in the distribution of the fund in court; but this claim was rejected by the master.

From the payment of the first year's notes, in July, 1839, nothing transpired in the history of the trust until the 1st of May, 1840. On that day, Crocker and Richmond, feeling that they should not be able to meet their second year's notes which would become due on the 1st of July following, addressed a printed circular to all their creditors, containing, 1st, a request of further time for reasons stated; 2d, a statement of the trustees, that a sale of the property could not then be made without loss; and, 3d, an answer for the signatures of such of the creditors as should assent to the request. Twenty-three of the creditors signified their assent; nine declined without some further condition; and the residue made no answer. The second year's notes, due July 1st, 1840, were not paid when due, or at any time afterwards.

Before the third year's notes became due, Crocker and Richmond made an attempt to procure a further extension, which resulted in a proposition made by a committee of the creditors, to extend the time of payment for another year, on certain conditions, one of which was, that all the creditors, who were parties to the trust deed, should become parties to this arrangement. An instrument was prepared accordingly, and executed by many of the creditors, but not by all.

In December, 1841, the property of Crocker and Richmond was taken possession of by virtue of a warrant, under the insolvent laws, and was subsequently conveyed to two of the defendants in this suit, Charles J. Holmes, and Lovett Morse, who were duly chosen assignees.

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The trustees were directed, by a vote of the creditors, to take possession of the property in July, 1842; and, from that time, to the time of the rendering of their account, they charged themselves with the proceeds, rent, and income thereof.

Upon the facts above stated, the proceedings of the trustees were called in question, and various particulars of their account objected to, on behalf of the plaintiffs.

It was contended, that the trustees, by the terms of the conveyance to them of March 22d, 1839, and of their receipt or certificate of the same date, were bound to take possession of every article of the property enumerated in the conveyance, and to account therefor, and that they were estopped to say that they had not received the same, or that no evidence of the title or ownership thereof had come into their hands.

It was also contended, that, from the facts as above stated, it appeared, that Crocker and Richmond did not pay the whole amount of the first year's notes, which became due in July, 1839; that it thereupon became the duty of the trustees to sell the whole property, and to apply the same to the payment of the debts of Crocker and Richmond; and that in default thereof they were bound to account for the same at its fair market value on the 1st of July, 1839.

It was urged, on the other hand, for the trustees, that they had not been guilty of any neglect or omission of duty; that they had never been called upon to reduce into possession the property conveyed to them by the deed of March 22d, 1839; that the paper of the same date, signed by them, was merely a certificate and not a receipt, still less an estoppel; that the condition, on which they were to take the property into their hands, and dispose of the same, was not broken in July, 1839, nor until July, 1842; and that they were not to be held liable for any depreciation of the property which occurred between those dates.

The trustees, in their account, claimed to be exonerated from all liability for certain articles of property, five in number, (as to two of which no question was made in this

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court,) included in the conveyance and certificate of March 22d, 1839, on the ground, that the same were not delivered to them at the time, and that no evidence of the title or ownership thereof had ever been placed in or come to their hands. The plaintiffs objected to the allowance of the account in reference to these particulars.

1. The first item consisted of eighty-four shares in the capital stock of the Taunton Manufacturing Company, which, at the time of the conveyance, were in the hands of George L. Willard, surviving partner of Willard and West, as collateral security for a debt of $8500, and which were to be transferred to the trustees, on the settlement of the account between Crocker and Richmond and Willard and West. The debt, for which these shares were held, was never paid, and they were sold in 1842 for less than half the amount for which they were pledged.

It was in evidence before the master, from a witness who kept the books of the Taunton Manufacturing Company, from 1836 to the failure of the company in 1843, that, although the stock was considered as valuable by Crocker and Richmond, yet, in his opinion, there never was a time subsequent to the 22d of March, 1839, when these shares would have sold for $8500.

The master reported, that the trustees were not responsible for these shares.

2. The second item consisted of two hundred shares in the capital stock of the Cohannet Bank, which were conveyed by the deed of March 22d, 1839, as "always subject to the payment of $10,000, to the said bank," and described in the certificate of the same date, as subject to "a lien which the bank has of $10,000 included by said company as one of their debts."

In reference to this stock, it appeared, that, on the 5th of April, 1837, Crocker and Richmond, then being the owners of two hundred shares, and, at the same time, indebted to the bank in the sum of $10,000, transferred the shares to Milton Barney, to be held by him as collateral security to

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the bank, for the payment of the debt. Crocker and Richmond were also indebted to the bank in a further sum of $2300, for over drafts.

At the time of the conveyance, therefore, to the trustees, there was no stock of the bank standing in the names of Crocker and Richmond; but, on the next day afterwards, March 23d, 1839, Barney transferred the shares standing in his name to the bank itself, which continued to hold them as collateral security for the debt of $10,000; and the bank afterwards allowed Crocker and Richmond to have the entire control over the stock, to receive the dividends payable thereon, (which they did for the years 1837, 1838, and 1839,) and to direct all subsequent transfers thereof, subject to the lien of the bank, as fully as if the stock had stood in their own names.

The trustees did not interfere, in any manner, to prevent Crocker and Richmond from dealing with these shares as their own; nor did they ever take any measures to reduce the stock into their own possession; and one of them stated in evidence before the master, that, in his opinion, the trustees could enforce no claim against the stock, because it did not stand in the names of Crocker and Richmond.

These two hundred shares were subsequently transferred by the bank, agreeably to the directions of Crocker and Richmond, and the proceeds were appropriated to pay Crocker and Richmond's debt to the bank, — towards payment of a debt due from them previous to the 12th of April, 1837, — and to the raising of funds for their use.

It was contended, on these facts, that the trustees were responsible for the par value of the stock, deducting the amount for which it was pledged to the bank; but the master decided otherwise, and reported that the trustees were not responsible therefor.

3. The third item, from which the trustees claimed to be exonerated, was the interest of Crocker and Richmond in twenty-four shares of the stock of the Weymouth Iron Company, which was specified in the agreement of the creditors

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contained in the instrument of July 1st, 1838, and in the receipt or certificate of the trustees, dated March 22d, 1839, but not included in the trust deed of that date. In the certificate, it is recited, that the twenty-four shares of the Weymouth Iron Company were to be placed in the hands of the trustees, when the certificates thereof should be issued by the company.

In regard to this interest, it appeared, that, before the execution of the conveyance in trust, Crocker and Richmond had subscribed for twenty-four shares in the stock of the Weymouth Iron Company (incorporated March 4th, 1837), and had paid $3600 towards their subscription. The certificates of stock had not been issued when the trust deed was made, and Crocker and Richmond, not wishing to pay any further subscriptions, sold their interest as subscribers to the Taunton Iron Company, who paid the remaining assessments, and credited Crocker and Richmond with the $3600 previously paid by them. The company was successful, and the Taunton Iron Company subsequently sold its interest therein at a small advance.

The master was of opinion, and so reported, that the trustees were not responsible for this item.

The trustees also claimed an allowance for certain articles of property, included in the conveyance to them, which remained unsold, and which they considered to be of no value.

The property of this description, in reference to which a question was made, consisted of one hundred and twenty shares in the stock of the Bristol Print Works, and one hundred and forty shares in the stock of the Taunton Iron Company, which, the plaintiffs contended, it was the duty of the trustees to have sold in July, 1839, and that having failed to do so, they had been guilty of neglect, and were accordingly bound to account for the property at its fair market value, at that time.

The trustees, on the contrary, contended that it was not their duty to sell this property in July, 1839, and that

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inasmuch as the shares had since become of no value, without any fault of theirs, they should not be held to account therefor.

The facts, relating to the allowance claimed by the trustees, on account of these stocks, were as follows:

In regard to the shares in the Bristol Print Works, it was in evidence before the master, that they began to depreciate in value from the latter part of the year 1838; that they could not have been sold at all in the year 1839, or at any subsequent period; and that in point of fact the company was insolvent in 1839. The business was afterwards continued by the company, in the hope of retrieving its affairs, but without success; and, in 1841, it had lost its whole capital and was so heavily involved, that an assessment became necessary upon the shareholders, in order to meet the liabilities of the company.

The one hundred and forty shares in the Taunton Iron Company, for which the trustees claimed an allowance, were a part of the two hundred included in the trust deed, the remaining sixty having been released or conveyed by the trustees, as already stated, to Crocker and Richmond, in orde to enable them to meet their first year's notes, in July, 1839 In October, 1842, the Taunton Iron Company became insolvent, and assigned all its property for the benefit of its creditors. The private property of the stockholders had become liable for the debts of the corporation, in consequence of a neglect to comply with the requisitions of the law relating to manufacturing corporations, and there had consequently been no sales of stock for some years before the failure. For these reasons, the stock had no market value, and could not have been sold to any advantage.

The master reported, that the trustees were not liable to account further for these shares.

The plaintiffs objected to the allowance of the first item of payments and expenses charged in the account of the trustees. This charge was as follows:

"1839. First instalment notes of Crocker and Richmond,

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taken up by sale of Taunton Railroad and Taunton Iron Company's stock:

"Amount [of notes] enumerated, . . . $67,642·20
"Less paid by Crocker and Richmond, ... 28·20

$67,614"

This sum corresponded exactly with the amount of the first two items of the sales of the trust estate:

"81 shares stock in Taunton Branch Railroad Corp., $7,614
"60 shares stock in Taunton Iron Co., ... 60,000

$67,614"

The notes, enumerated and charged as above, were offered before the master as vouchers for the proceeds of the first two items of sales.

The plaintiffs objected to this portion of the trustees' account and contended upon the facts previously stated with reference thereto, that the trustees had no right to release or convey the two items of property above mentioned, but that they should be held responsible therefor, and that the notes produced by the trustees were not in any sense legal vouchers or evidences of payment, to discharge the trustees.

The master was of opinion, that these notes were proper vouchers to discharge the trustees from the sales above mentioned, (without reference to the claims of the Taunton Iron Company, on account of two of them, and whether those claims were allowed or not,) and reported accordingly that the trustees should not be held further responsible for the same.

The plaintiffs objected to the items of $2182·24 and $3670·30, paid to Baylies and Sproat, two of the defendants, respectively, as assignees of Crocker and Richmond, under the indenture of April 12th, 1837, on the ground, that their services as such assignees were a proper subject of charge against Crocker and Richmond only, and not against the trust fund; that these charges were not a claim provided for by the decretal order; and that if they were a lien on the

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estate conveyed to the assignees by the indenture of April 12th, 1837, the lien was waived by the release of the property to Crocker and Richmond, in pursuance of the arrangement which was completed by the execution of the trust deed on the 22d of March, 1839.

The trustees contended that their claim for services, under the indenture of April 12th, 1837, was paramount to all others; that by the terms of that instrument, the assignees were to be first paid for their services, before any disposition could be made of the proceeds of the estate thereby assigned; and that the estate had never been discharged from the lien.

The master was of opinion, and reported accordingly, that these charges ought not to be allowed, and that the trustees were bound to account for the sums retained by them on account thereof.

The trustees charged for their services, under the trust deed, the sum of $4362·28, being a commission of five per cent on $87,215·71, the amount of sales of property made by them, on their own authority, and the further sum of $2076·52, being a commission of five per cent on $41,530·57, the amount of sales of property made by them under the order of this court.

The plaintiffs objected to these charges as being too large.

The master reported, that, at the hearing, no particular evidence was given as to the extent, nature, or difficulty of the duties performed by the trustees; but, it was urged, that, upon the admitted facts in the case, they had entitled themselves to a liberal compensation; that the amount of property was large, — that their position was one of peculiar delicacy, — that they had employed eight years in the discharge of their duties as trustees, — and that in the course thereof they had been involved in two suits at law and one in equity.

The master, being of opinion that the commissions charged were not an unreasonable compensation for the services rendered, allowed the charges in question.

The cause was argued, upon the facts and with reference to the questions above presented, as well as others upon which

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the court did not find it necessary to express any opinion, by *R. Fletcher & W. R. P. Washburn*, for the plaintiffs; by *S. Bartlett*, for the assignees of the Taunton Iron Company and William Rotch, Jr.; and by *T. G. Coffin*, for the trustees.

Shaw, C. J. In this case, a decretal order was entered at a previous term, by the consent of parties, by which the cause was referred to George S. Hillard, Esquire, one of the masters in chancery for this county. The report of the master having been made and filed, exceptions have been taken to it by various parties, as hereinafter stated, and arguments of counsel heard thereon.

Among other things, the effect and operation of the decretal order was, to adjudge and decree that the indenture of the 12th of April, 1837, had become inoperative and no longer in force; that the trust deed of the 22d of March, 1839, from Crocker and Richmond to Baylies, Sproat and Crandell, was valid and sufficient to transfer the real and personal property therein described; and that the surviving trustees, Baylies and Sproat, were bound to account, in this suit, for the property and the proceeds thereof, to those creditors of Crocker and Richmond, who were so by reason or on account of debts and claims, which were in existence on the 12th of April, 1837, the time of the making of the first described indenture.

The master was also directed to ascertain and report, among other things, what amount was due the plaintiffs in this suit from Crocker and Richmond, on account of any claim or claims, which existed on the 12th of April, 1837, and to order notice to be given to all other persons, creditors as aforesaid, having similar debts and claims, to come in and prove the same, or be forever excluded from the benefit of the decree.

The master was thereby further directed to report the names of all such creditors, and the amounts due to each of them, on account of claims existing on the 12th of April, 1837, although the evidence thereof might have been changed since that day.

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We will first proceed to consider the exceptions, taken by the general creditors to the master's report, allowing sundry claims of the assignees of the Taunton Iron Company, as debts legally and equitably existing against Crocker and Richmond on the 12th of April, 1837, the evidence of which has been changed; by reason of which, as the claimants allege, these claims are within the intent and meaning of the decretal order. That they were not debts due to the Taunton Iron Company, at the time named, is very clear, because that corporation did not come into existence until long afterwards.

The relation of this corporation to Crocker and Richmond was very peculiar. It appears, that prior to April, 1837, there were two commercial houses established in Taunton, one under the firm of Crocker and Richmond, consisting of Samuel Crocker and Charles Richmond; and the other under the firm of Horatio Leonard and company, consisting of Crocker and Richmond, Horatio Leonard, George Leonard, Charles Robinson, J. Robinson, and E. Robinson.

By an act of incorporation passed March 7th, 1837, the same individuals, composing the firm of Horatio Leonard and company, were incorporated by the name of the Taunton Iron Company; but this corporation was not organized until the ensuing December, which was long after the failure of both houses, and after the trust deed executed by Crocker and Richmond on the 12th of April, 1837.

The firm of Horatio Leonard and company failed at the same time with Crocker and Richmond, and assigned their property to the same trustees, Baylies, Sproat and George A. Crocker, for the benefit of their creditors.

The Taunton Iron Company was organized on the 27th of December, 1837, and, on the 2d of January, 1838, purchased of the assignees of Horatio Leonard and company all the assets of that firm, and received a conveyance thereof from the assignees; the corporation undertaking, at the same time, to pay and discharge all the debts and obligations of Horatio Leonard and company.

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The grounds upon which the Taunton Iron Company, coming into existence long after the 12th of April, 1837, claims as a creditor holding debts due on that day, are, that, having purchased all the assets, and undertaken to pay all the debts, of Horatio Leonard and company, the corporation became, in equity, their successor, and stood in their place, and took their rights; that the debts in question were debts due from Crocker and Richmond to Horatio Leonard and company; that the assignment of the assets of Horatio Leonard and company transferred to the Taunton Iron Company, in equity, the debts due from Crocker and Richmond; that these debts existed on the 12th of April, 1837, and carried with them the benefit of the trust fund, created for the security of all the debts of Crocker and Richmond, which were due at that time; also, that, at that time, Horatio Leonard and company stood in the relation of indorsers and sureties, on a large amount of the debts due from Crocker and Richmond; that, by force of the obligation of the corporation to pay all the debts of Horatio Leonard and company, it was bound to pay and take up the notes on which Horatio Leonard and company stood as indorsers and sureties for Crocker and Richmond; and, that, having so paid them, the corporation is entitled to stand in the place of the creditors whose debts were thus paid, and to have the benefit of the trust fund created for the security and payment of those debts by Crocker and Richmond, who stood in the character of principal debtors; also, that Crocker and Richmond, after the 12th of December, 1837, and after the organization of the Taunton Iron Company, made use of the funds of the latter to pay debts due prior to the 12th of April, 1837; and that in equity the corporation has a right to look, not only to Crocker and Richmond, but to the fund provided for the payment of the debts thus discharged.

The master, by his report, has divided these claims of the Taunton Iron Company into five classes; and has reported the facts respecting each class, together with his decision thereupon.

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I. The report states, that the first class comprises payments made by the Taunton Iron Company of negotiable paper originally signed by Crocker and Richmond, and indorsed by Horatio Leonard and company, or *vice versa*. The report is not so full, precise and intelligible, with respect to this class, as could have been desired; and we are not certain, after the closest examination, that we understand the facts, as they were understood by the master. In the description given by the master of these claims, notes indorsed by Horatio Leonard and company, and notes signed by Horatio Leonard and company, and indorsed by Crocker and Richmond, are put on the same footing. In regard to the latter, that is, notes signed by Horatio Leonard and company, the legal presumption is, that Horatio Leonard and company were the principal debtors, and Crocker and Richmond the sureties; if so, the amount due on such notes was the proper debt of Horatio Leonard and company, and the Taunton Iron Company, by its obligation, was bound to pay the same out of the assets assigned, and would have no remedy even against Crocker and Richmond, and, of course, no claim on the trust fund. But the report afterwards goes on to say, "that these indorsements *or signatures* were made by Horatio Leonard and company on account of Crocker and Richmond, and for their benefit;" from which we conclude, that the master had satisfactory proof before him, that, although the names of Horatio Leonard and company appeared as promisors or makers on these notes, yet, in point of fact, this was matter of form only, and the notes were really issued for the proper debts of Crocker and Richmond, and for their accommodation; and that if Horatio Leonard and company took them up, they did so, in effect, as sureties, and that Crocker and Richmond thereby became liable for the amount.

We also understand, by the report, that these specific notes, on which, on the 12th of April, 1837, Crocker and Richmond were principal debtors, and Horatio Leonard and company were sureties, remained unpaid, until after the Taunton Iron Company came into operation, and were then paid and taken

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up by that company, under its obligation to pay the debts of Horatio Leonard and company.

If these notes and acceptances were in fact renewals of debts existing on the 12th of April, 1837, that is, if, after the Taunton Iron Company came into operation, notes outstanding in April, 1837, were taken up by Crocker and Richmond, by giving their own notes, with the signature or indorsement of the Taunton Iron Company, instead of the preëxisting indorsement or suretyship of Horatio Leonard and company, although these notes were afterwards paid by the Taunton Iron Company, such payment would be a new credit given by the Taunton Iron Company to Crocker and Richmond, originating after the 12th of April, 1837, and could not be considered as made in virtue of their undertaking to pay the debts of Horatio Leonard and company, but as a payment of a debt newly created in virtue of a new loan of their credit to Crocker and Richmond, and thus would not be a debt coming under this class of claims.

Supposing the class of claims thus allowed by the master to consist of notes constituting the proper debt of Crocker and Richmond, on which Horatio Leonard and company were indorsers or sureties; and supposing these notes to be subsisting on the 12th of April, 1837, and continuing specifically until paid and taken up by the Taunton Iron Company and then paid and taken up by the latter; the court are of opinion, that the decision of the master allowing them as claims existing April 12th, 1837, of which the evidence or form had changed, was right, and that the exceptions to that part of the master's report allowing them must be overruled.

This conclusion rests on the assumption, that the Taunton Iron Company, as the assignee of the assets of Horatio Leonard and company, and as having undertaken to pay their debts, may now come in and prove on the footing of creditors, to whom debts were actually due on the 12th of April, 1837. On recurring to the assignment of that date from Crocker and Richmond to trustees, we find, that, in the class of their creditors amongst whom an equal distribution

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of the trust property was to be made, were included those who might afterwards become their creditors, by reason of any then existing note, acceptance, indorsement, or liability; that is to say, those who were then standing in the relation of indorsers or sureties, on contracts previously made, and who might be obliged to pay the debts, for which they so stood as sureties, (although, strictly speaking, in such cases, the debt arises on the payment as surety, and not on the making of the contract, yet,) should be taken and deemed, for the purposes of that trust, to be actual creditors; and this is conformable to the provisions of the act of 1836, c. 238, which was then the law regulating assignments for the benefit of creditors. Under this provision of the assignment of April 12th, 1837, if Horatio Leonard and company stood in the relation of sureties or indorsers for Crocker and Richmond, they were parties to the assignment, and *cestuis que trust*, who might become creditors by payment of the debts for which they were sureties. On making such payment, they would stand upon the same footing, in reference to the trust, as if they were creditors to whom debts were actually due.

This brings us to the consideration of a very important question, in the present case, namely, whether the Taunton Iron Company, acting under the forms of a corporation, but being the successor and assignee of Horatio Leonard and company, a firm in which Crocker and Richmond were themselves partners, and, in which, when made a corporation, they held the larger part of the stock, can prove its claims under a trust, which was created for the benefit of the creditors of Crocker and Richmond, in competition with those creditors. This proof was resisted by the creditors, but allowed by the master; and, being now excepted to, presents the question for consideration.

We think it is a well settled rule of law, that, as between original parties, by the assignment of a chose in action, the assignee takes an equitable title to the demand assigned, in the same plight, in which it was held by the assignor, entitled

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to the same immunities, privileges and benefits, and subject to the same charges, equities, rights of set-off, and counter claims, as in the hands of the assignor. This is the principle, upon the ground of which the Taunton Iron Company alleges, that, having by various legal and equitable conveyances become entitled to debts due from Crocker and Richmond to Horatio Leonard and company, it thereby became entitled in equity to the benefit of a trust fund, then previously created by Crocker and Richmond, for the ultimate security of those debts.

There would certainly be strong ground to sustain this claim, if these were separate and independent parties. But we are met by the objection, that the Taunton Iron Company can stand on no better ground than Horatio Leonard and company, who could not be permitted to prove as creditors. On recurring to the facts, it appears, that Horatio Leonard and company were a firm composed of Leonard and the Robinsons, together with Crocker and Richmond, who were themselves the owners of the major part of the whole interest. The argument is, that Horatio Leonard and company could not come in and prove, in competition with the creditors of Crocker and Richmond, before those creditors had been paid in full. This could not be done, it is said, by the firm of Horatio Leonard and company, because it would in effect enable Crocker and Richmond, composing a part of that firm, and being the major part in interest, to take back, in another form, a part of the funds assigned for the benefit of their creditors; nor could any claim be made by the other members of the firm, because the debt was a joint one, and could only be claimed by all jointly.

The trusts, on which the assignment of the 12th of April, 1837, was made, do not countenance the idea that any firm, in which Crocker and Richmond were partners, could share in the fund. The assignment was in trust, after other things, to distribute the residue of the assigned property to and among all the creditors of the firm of Crocker and Richmond, and of Samuel Crocker and Charles Richmond, and all who

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should become their creditors, by reason of any then existing note, acceptance, indorsement, or liability for them. If Crocker and Richmond could take a part of the fund themselves, it would not be wholly in trust for their creditors. Indeed, by the statute of 1836, c. 238, under which this assignment was made, it would have been void, if it had not been so made as to include all the debtors' property, not exempted from attachment, for the benefit of all their creditors, and to give to all the creditors an equal distributive share of the whole property assigned. It seems, therefore, to be a just inference, that if the assignment had expressly recited, that the property was to be held in trust, amongst other purposes, to pay a debt due to the firm of Horatio Leonard and company, a firm of which the assignors were themselves members, and so in part in trust for themselves, it would have been contrary to the spirit of the statute, and to that extent at least questionable.

Were this the case of a firm consisting of a number of persons, some of whom composed a separate minor firm, and the separate minor firm were in a process of insolvency, under a trust deed, or under legal proceedings, it would be difficult to say, that the larger firm could prove; therefore, if Horatio Leonard and company were solvent, and were claiming in their own right, it would seem, that they could not, as creditors, prove debts due from Crocker and Richmond, composing a part of the same larger firm, for the reasons stated. But there are several circumstances, which distinguish this from the common case, and take it out of the operation of the general rule.

It is a fact, worthy of some consideration, perhaps, though of itself not very decisive, that these were distinct concerns established for distinct purposes, the larger being a manufacturing establishment, carrying on the iron business, and the smaller a firm engaged in general commerce.

But further, we understand that both the Taunton Iron Company, and Crocker and Richmond, are deeply insolvent; and that in truth this is a question only between the two

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classes of creditors. It was stated in argument, indeed, that it did not appear, that the Taunton Iron Company was insolvent, and perhaps it does not so appear directly; but it does appear from the evidence in another part of the case, that the shares in the stock of the Taunton Iron Company are worth nothing; from which it may be inferred, that, on payment of their debts, nothing would be left for the holders of shares. Then, as between the respective classes of creditors, we think it is not inequitable to admit this proof, so far as to distribute the assets, as if the concerns had in truth been separate.

But supposing it should turn out, that the Taunton Iron Company is not insolvent, and that upon the allowance of its claims, the distributive shares payable to Horatio Leonard and company, together with other effects, will be sufficient to pay its debts, and leave a surplus; in that event, we can perceive no objection to framing the decree in such a manner, as to direct an account to be taken between the partners, and that any distributive share of the surplus, which should be coming to Crocker and Richmond, as stockholders, should be retained and paid to their assignees, to be added to the fund distributable amongst their other creditors. If, therefore, considerations of equity would require, in the case supposed, that these parties, for the purpose of regulating the distribution of assets between the two classes of creditors, should be regarded as separate parties, this consideration would not be necessarily controlled by the objection, that, in such a distribution, Crocker and Richmond, as a part of the larger firm, might take a part of the fund, against their own creditors, and against the terms of the trust assignment.

But what distinguishes this case still more from the ordinary case supposed, and seems quite decisive, is, that the Taunton Iron Company, now claiming, is a corporation, vested by its act of incorporation with the functions of a body politic, and, as a distinct person, capable of acting and dealing and contracting with its members, as with third persons. And though this corporation originally consisted of the same persons who composed the firm of Horatio Leonard

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and company, and though Crocker and Richmond were holders of two hundred out of the three hundred shares, into which the capital stock of the company was divided, yet, by the incorporation, the relation of Crocker and Richmond to the company, and their interest in its stock, became entirely distinct from the relation which subsisted between them and the firm of Horatio Leonard and company, and their interest therein, whilst they were members of that firm. They could contract with the corporation, and could maintain suits against it, both in law and in equity, and could be sued by the corporation. They might transfer their shares in whole or in part, and thus cease partially or wholly to have any interest in its funds.

But further, as we understand the case, Crocker and Richmond, by their assignment of March 22d, 1839, transferred to the trustees all their shares in the Taunton Iron Company, as then organized and in operation, so that should that company be solvent, and leave any thing for the stockholders, such surplus would be received and held by the trustees, as a part of the trust fund distributable among the creditors of Crocker and Richmond, by which justice would be done.

The fact, that the members of the larger firm became incorporated pursuant to the provisions of law, and thereby acquired a capacity to contract with their members, and to sue and be sued, distinguishes the case from the ordinary one of the larger partnership proving against the funds of the smaller, or of the smaller proving against the funds of the larger, of which they are respectively constituent parts. The incorporation avoids the difficulty, which arises in those cases, where some of the same persons, in their natural capacities, act in the conflicting relation of debtor and creditor, in the same process.

The court are therefore of opinion, that, so far as the Taunton Iron Company can establish a legal or equitable claim against the trust fund, in the hands of the trustees, according to the terms and true construction of the trust deeds of April 12th, 1837, and of March 22d, 1839, and of

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the decretal order heretofore made in this cause, it is no valid objection thereto, that the Taunton Iron Company is the successor and assignee of the former firm of Horatio Leonard and company, although Crocker and Richmond, the assignors, were members of that firm and of the corporation which succeeded it.

II. The second class of claims made by the Taunton Iron Company against Crocker and Richmond, as debts due prior to April 12th, 1837, comprises payments made from the funds of the Taunton Iron Company, by Crocker and Richmond, to discharge debts due from Crocker and Richmond, of a date prior to April 12th, 1837. The Taunton Iron Company claims the right of substitution.

The material facts, in regard to this class, are, that Mr. Crocker was president of the Taunton Iron Company, authorized to sign and indorse the paper of the company, at his discretion, and had the general management and control of its affairs. Indeed, it is to be recollected, that Crocker and Richmond, at the time, were owners of two thirds of the shares, into which the stock of this company was divided.

The Taunton Iron Company, by its president and treasurer, had full notice of the credit of the company being given to Crocker and Richmond; and if, in consequence of a loan of this credit, the company was called upon to pay its indorsements, such payment simply created a new debt in favor of the company against Crocker and Richmond, and gave the company no claim, legal or equitable, upon the fund set apart for the security of Crocker and Richmond's previous debts. It amounted to a payment by Crocker and Richmond of their own proper debt; was so considered by the parties, at the time; and was entered on their respective books, as a charge by the company against Crocker and Richmond. The court are therefore of opinion, that the decision of the master, in allowing this class of claims, as a charge under the decretal order upon the trust fund, or as a demand existing on the 12th of April, 1837, was incorrect, and that the same must be reversed, and this class of claims disallowed.

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III. The third class of claims, made by the Taunton Iron Company, as a debt due from Crocker and Richmond, on the 12th of April, 1837, consists of a single item amounting to $70,879·14. This is a balance of account, which was due from Crocker and Richmond to Horatio Leonard and company, at the time when both firms made their respective assignments, April 12th, 1837, and which was subsequently assigned by Horatio Leonard and company to the Taunton Iron Company. The master reports, that, although the entry on the books, in which this balance is first stated, bears date the 15th of April, 1837, yet that it was actually due, and all the transactions out of which it arose took place, before the 12th of April, 1837; and, therefore, if it can be regarded as a debt provable under this trust, it was due before and on that day.

For the reasons heretofore given, the court are of opinion, that if this debt has not been paid, liquidated, or reduced, by the subsequent transactions between the parties, it is a debt which may be proved against the fund by these claimants, in competition with the separate creditors of Crocker and Richmond.

In addition to the reasons heretofore stated, in reference to the first class of claims, we think it is to be considered, that, although the fund now sought to be distributed is a fund created by the voluntary assignment of Crocker and Richmond to the defendant trustees, on the 22d of March, 1839, and does not arise under any legal process of insolvency, yet, that the trust deed of March 22d, 1839, was a supplement to the anterior proceedings of April 12th, 1837. The deed of the former date was part of an arrangement, by which the property assigned under the indenture of April 12th, 1837, was reconveyed to the debtors, and a portion of it conveyed to the defendant trustees, to be held by them as security for the payment of the same debts, which were to have been satisfied under the former assignment, provided those debts should not, in the mean time, as was contemplated by that arrangement, be paid by Crocker and Richmond. This prin-

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ciple is recognized by the decretal order, which was entered by consent of all parties, and which directed that the property last assigned in 1839 should be applied to pay debts due at the date of the first assignment. That previous assignment was made in pursuance of the statute of 1836, *c.* 238, regulating assignments by debtors to trustees, in trust for the payment of their debts. The statute required that such assignment should embrace all the debtor's property, with a slight exception; and that it should provide for an equal distribution of the same among all his creditors; and it regulated the duties of assignees and provided remedies for parties interested. Whatever the statute was in terms, in effect, it was a qualified legal proceeding in insolvency, or a modified state bankrupt law. Both firms simultaneously made similar assignments, and to the same trustees. Under these circumstances, if a settlement of the affairs of both firms had been made under their assignments, we think the assignees of either firm would have had a right to prove a balance against the assets of the other. The two firms having carried on distinct branches of business, and kept distinct accounts, debiting and crediting each other, and having severally obtained credit according to their supposed capacities, means and success, the treating of them as distinct concerns, for the purpose of a distribution of their assets among their respective creditors, would appear to afford as equitable a rule as the state of such a complicated relation would admit. Under this rule, the assignees of Horatio Leonard and company would have a right to prove the balance in question against the assets of Crocker and Richmond; subject to this limitation only, that if there should be more than enough to pay the creditors of Horatio Leonard and company, in full, so as to leave a surplus to the firm, an account should be taken, and any balance coming to Crocker and Richmond should be replaced in the hands of their assignees, to be applied, until their separate creditors should be paid in full. Under the peculiar circumstances of the present case, resulting from the several assignments and the decretal order, the proofs are to be regulated,

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and the distribution under the last assignment to be made, upon the principle stated, namely, as if both firms were in bankruptcy, under distinct commissions; and, therefore, if the debt due by Crocker and Richmond, the minor firm, to Horatio Leonard and company, the larger firm, and assigned to the Taunton Iron Company, still subsists, it is provable against the fund to be distributed.

But it is contended by the other creditors, that this balance has been liquidated by the subsequent dealings and transactions between Crocker and Richmond and the Taunton Iron Company.

The ground taken is, that subsequent to April 12th, 1837, the Taunton Iron Company charged this balance in account with Crocker and Richmond, and took them as its debtors; and that, although the corporation remained the creditor of Crocker and Richmond, as before, for this balance, the balance thus became a debt which occurred after April 12th, 1837, and consequently cannot be proved under the decretal order. It appears, that four several accounts current were rendered by the Taunton Iron Company to Crocker and Richmond, the first item in the first of which is a balance of $70,919·60, which is the same or nearly the same as that due from Crocker and Richmond to Horatio Leonard and company, at the date of their respective assignments. This account was made out by the Taunton Iron Company, under date of April 15th, 1837, many months before that company was organized as a corporation. But it was brought down to May 1st, 1838, which was after the corporation was organized. These circumstances are alluded to, that they may be made the subject of more particular inquiry and consideration, if they should be found to be of any importance. The court are of opinion, that neither the charging of this balance in a new account, opened by the Taunton Iron Company with Crocker and Richmond, of a date subsequent to April 12th, 1837, nor the rendering of such an account, would necessarily deprive the company of the benefit of the assignment, if otherwise entitled to it. Such entries in books and

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accounts are not held to be conclusive, and, under some circumstances, they are not of much weight, as evidence. *Barker* v. *Blake*, 11 Mass. 16; *Baring* v. *Crafts*, 9 Met. 380. But this claim does not stand upon the footing of mere entries in books or accounts; it was the commencement of an account, under which large and extensive dealings took place, for several years, between the parties; and it becomes necessary, therefore, to inquire into the character of those dealings.

It is manifest, from the proposals made by Crocker and Richmond to their creditors, in January, 1838, and the arrangement agreed upon under the same, but not completed until March 22d, 1839, that the object of Crocker and Richmond, in that arrangement, was to disengage the more active and available part of their funds, embraced in the first assignment, and to have those funds restored into their own hands, in order to enable them to engage in active commercial business, under an expectation, out of that business, to pay their debts by instalments; and also to reassign the residue of the property to the present trustees, as a security for the ultimate payment of the same debts. It is manifest, that the Taunton Iron Company, after its organization, engaged actively and extensively in the manufacturing business, and in transactions incident thereto, though it is difficult to perceive how and when that corporation acquired any capital to enable it to do so. Crocker and Richmond were stated to be the owners of two thirds of the capital stock, and their interest therein was actually estimated, in their second assignment, at $200,000; although the whole of their property was under sequestration, and in the hands of assignees, from the time of the organization of that company, to the time of such second assignment. But, by whatever means it was done, it appears that both parties went into active business, and that there were large transactions between them, which are embraced in these accounts.

It was proper for the Taunton Iron Company to carry this balance into its new account against Crocker and Richmond,

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because the latter were to pay it. And if the parties went immediately or at any time afterwards into active business, in the course of which new credits were given, and new debts made, and an account stated and rendered, and the balance carried to new account, and so on, we are of opinion, that, if the aggregate of the money paid on such general account, without any specific application or appropriation thereof, exceeded the original item of debit, consisting of the balance with which the account commenced, that original balance must be considered as liquidated and absorbed in the general account, and is no longer to be regarded as a debt due April 12th, 1837.

We say payments on general account, in reference to which there was no appropriation or specific application. If it should appear, from the entries themselves, to the credit of Crocker and Richmond, that the moneys so credited were paid specifically on account of a debt which was contracted after the 12th of April, 1837, or otherwise upon any specific appropriation, these payments must be regarded as payments on account of such specific debt or appropriation; but payments generally to them, or for their use, and charged in account, must be deemed payments on such general account. The report does not state the facts with sufficient fulness, to enable us to judge whether this first balance has been liquidated and absorbed by payments on general account; and we think it must be again referred to the master, to make a more specific statement, with reference to this point, conformably to the principles above stated. There appears also to be a credit in this account, in March, 1840, of $40,000, as a dividend of profits. We do not see why this is not a credit to Crocker and Richmond, in general account, and thus applicable to the balance first above charged. But this is not fully stated. The whole of this account, therefore, with the item in question, must be referred to the master for the purposes suggested.

IV. The fourth class comprises a single item of $8500, which the Taunton Iron Company claimed to have paid in full, as a preferred debt, out of the trust fund.

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This claim was disallowed by the master, both as a general and as a preferred debt. The only possible ground, on which it could be made, was, that the common trustee had taken money from the trust fund of one trust, and added it to the trust fund of the other trust, the latter receiving it with notice of the former trust. We are of opinion, that the facts do not bring the case within this principle. The object of Sproat, in taking funds from the trust of Leonard and company, and applying them to the trust of Crocker and Richmond, was to redeem a large amount of shares in the Taunton Manufacturing Company, belonging to the latter trust. But, in truth, these shares never were redeemed. In the first instance, they were pledged for new acceptances, which went to the then present use of Crocker and Richmond, and not to the trustees, and the shares were afterwards sold, to satisfy these drafts, and were insufficient for the purpose.

The court are of opinion, that the decision of the master, disallowing the claim of the Taunton Iron Company, to have this sum paid out of the trust fund in full, was correct, and the report in that respect is confirmed. The claim to have it allowed, as a general debt, entitling the claimants to a dividend, was waived at the hearing.

On this part of the case, it was said in argument, that the facts reported would not sustain the position, that the money raised by discounting the new acceptances of Otis and Mason went to the use of Crocker and Richmond, and not into the hands of the trustees for the benefit of their creditors. But we are inclined to that opinion from the whole evidence. Sproat testified, indeed, that the proceeds were applied to the benefit of the estate of Crocker and Richmond, in the hands of their assignees; but he could not tell how they were applied, or whether they were applied at all, to any of the purposes of that trust. On the contrary, it does not appear, that the assignees have applied those proceeds, or that they now hold them, or that at that time, namely, November 3d, 1837, the trustees had paid any of the debts of Crocker and Richmond. But the question does not depend on that fact. The

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object which Sproat had in view was to get further time for the sale of the shares in the Taunton Manufacturing Company, which, in the agreement of July 1st, 1838, between Crocker and Richmond and their creditors, were estimated at $58,906·25. Had the object been attained, and had this sum been saved to the trust fund, there would have been more equity in the claim. But the object failed. If the money, which was derived from the discount of the new notes, was not brought into the fund for distribution amongst the creditors, then this fund has derived no benefit from the operation.

But further, this transaction took place in November, 1837 before the Taunton Iron Company was organized, and, of course, before any transfer of the assets of Horatio Leonard and company to the Taunton Iron Company by the assignees of the former. The assets in the hands of Willett and company had been then disposed of, and, of course, the claim therefor (of Horatio Leonard and company against Willett and company,) as a chose in action, did not pass by that assignment. Can it be presumed, without some special provision to that effect, that it was the intention of the then assignees of Horatio Leonard and company, to transfer to the Taunton Iron Company a claim against themselves, in another capacity, for a breach of trust, in having thus disposed of some of the assets? It appears to us, that no such intention can be presumed. Horatio Leonard and company and the Taunton Iron Company, at that time, consisted of the same persons, and notice to them in one capacity was notice to them in the other. When, therefore, this company was afterwards organized, and the assignment made by the assignees to the corporation, we think it must be considered, that the latter took the assets as they then existed, unless there was some special provision in the assignment, expressing more particularly what claims, as choses in action, were intended to pass. This view is confirmed by the fact, that the claim in question was, as we understand, charged in the accounts as a demand against Crocker and Richmond.

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But further, under the decretal order, we think this was not a debt due from Crocker and Richmond, April 12th, 1837, which the master was directed to inquire into and state. If this claim be well founded, it is not for a debt; it is a claim, that a certain sum of money, belonging to the Taunton Iron Company, has, by mere accident or management, been placed in the fund created for the benefit of the creditors of Crocker and Richmond, and that the assignees of the Taunton Iron Company have a good equitable right to withdraw the same, before the fund can be distributed.

V. The fifth and last class of claims consists of notes of Crocker and Richmond, indorsed by the Taunton Iron Company, given in payment of debts due prior to April 12th, 1837, which the assignees of the Taunton Iron Company have paid and now hold and produce. These were allowed by the master.

For the reasons already given, if the Taunton Iron Company was in a condition, as the holder, to claim debts due before the 12th of April, 1837, these demands could not be claimed. The indorsements of the Taunton Iron Company for Crocker and Richmond were a new loan of credit, originating with such indorsements, after the 12th of April, 1837; and, although the money thus raised went to pay and discharge debts due from Crocker and Richmond, which originated prior to April 12th, 1837, yet such payment was still a payment or discharge and extinguishment of the former debts by Crocker and Richmond, by the use of their own means, and did not continue the former debts in force. The court are therefore of opinion, that these are not debts included under the decretal order, as debts subsisting on the 12th of April, 1837, of which the form and evidence has been changed; that they ought not to have been allowed; and that the master's decision, allowing them, must be reversed.

VI. Several important questions, arising upon the decretal order, and the report, depend on the construction of the deed of trust of the 12th of April, 1837.

It seems to have been assumed and taken for granted by

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all parties, that the debts of Crocker and Richmond, as they existed on the 22d of March, 1839, and were agreed to be paid by instalments, and secured by the deed of trust of that date, were debts actually existing on the 12th of April, 1837, and that all payments, made by any person on those instalments, were in effect payments towards debts which existed on that day.

By the decretal order, the master was directed to inquire and report, whether any creditor had received, from the property held in trust under the deed of the 22d of March, 1839, or the proceeds thereof, more than one third of the amount of his demand, as the same existed on the 12th of April, 1837, (that being the proportion supposed to have been paid the creditors generally since the 12th of April, 1837;) and if so, the excess so paid, over and above one third of the claim of such creditor, was to be considered as a payment *pro tanto* of any dividend to which he might otherwise be entitled.

This direction would seem to imply, that the trust deed of the 22d of March, 1839, had been under the consideration of the court, and that it had been judicially determined, that the deed created a trust fund, specifically applicable to the payment of the instalment notes then to be given; and that all payments made on those instalment notes were made directly or indirectly out of the fund, and diminished it *pro tanto*. Hence it has been inferred, and the inference would seem to be a just one, upon the premises, that as the fund was created and appropriated to the equal benefit of all the creditors, in proportion to their debts, if any one creditor had not received the full amount of his first instalment, or one third part of his debt, he should be entitled to receive a sum out of the fund, sufficient to make his payment one third, before other creditors should receive any thing more; and so, if a creditor had received more than his one third, the excess over one third should be considered as an advance to him towards his next dividend, and deducted accordingly from that dividend.

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But these inferences, and others material to the cause, depend upon the nature, purposes and operation of the deed of trust, which, as yet, has not been the subject of judicial construction. The decretal order was agreed upon by the parties, and was probably framed with a view to bring such facts before the court, as might enable them to come to a decision, according to the legal construction which might be subsequently given to the deeds, and to enable the court to ascertain and decide upon the rights of the parties.

Looking at the deed of the 22d of March, 1839, and the preliminary agreement of the creditors of July 1st, 1838, the proposals recited in the latter, the objects and purposes therein expressed, and the provisions, stipulations and conditions contained in it, the question is, whether the arrangement effected by these instruments constituted and set apart a fund, the proceeds of which should be specifically applied, by the trustees, to the payment of the notes payable in one, two and three years, then proposed to be given by Crocker and Richmond, as they should become due; or whether the trust deed, by which the arrangement was completed, was a mortgage or conditional conveyance of the real estate and property specified therein, defeasible upon the payment of the notes by Crocker and Richmond, according to the tenor thereof.

It seems to us quite clear, that the arrangement was of the latter character. The preliminary agreement recites a communication made by Crocker and Richmond to their creditors, on the 10th of January, 1838, referring to the assignment of the 12th of April, 1837, and representing the difficulty and impracticability of making sales of the property; and proposing a mode, by which they might be relieved from the incumbrance of the previous assignment, and be left in possession of an available property of about $300,000, to enable them to go on with their business; and by which property consisting of real estate and stocks estimated at $600,000 and upwards might be appropriated, as security for the ultimate payment of their debts estimated at $380,000. It then recites an agreement of many of the creditors, accord-

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ing to these proposals; discharging the former assignees from all claims under the assignment of April 12th, 1837; stating the property to be conveyed to Sproat, Baylies and Crandell, in trust, to hold the same; and providing that in case Crocker and Richmond should fail to pay their several debts, in the manner proposed, the property should be sold, and the proceeds applied to that purpose, by the trustees. The trust deed, dated March 22d, 1839, completes the arrangement, and conveys to Baylies, Sproat and Crandell, and the survivors and survivor of them, the estate referred to, consisting of real estates, stocks, shares and patent rights, to be held in trust for the purposes particularly set forth in the agreement above described (which it substantially recites) between Crocker and Richmond and their creditors, made on the 1st of July, 1838. It then contains covenants against incumbrances, and the following condition: "Now, therefore, if the said Samuel Crocker and Charles Richmond shall well and truly pay to their several creditors the full and just amount of their debts, in the manner and on the days above mentioned, and otherwise faithfully comply with the terms of their said agreements above mentioned, and pay the trustees a compensation, &c.. then this deed to be void."

It seems very clear, that this was a conditional conveyance, defeasible on a condition subsequent; and that if Crocker and Richmond had paid their notes, agreeably to the terms thereof, the condition would have been saved at law, and the property would have revested in the grantors. It was therefore a mortgage, and gave the trustees no power to sell the property, until a breach of the condition, by the non-payment of the notes. It is equally clear, that the notes given by Crocker and Richmond were to be paid by them out of their own funds and means, and not by the trustees, out of the property thus mortgaged for security.

How it was expected that Crocker and Richmond, by the use and employment of about $300,000, were to pay $380,000, in three years, or how, with about one third of the fund, they were to pay debts, for the payment of which the whole fund

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in the hands of the former trustees had proved unavailing, it is difficult to conceive.

It is obvious, however, that Crocker and Richmond had one year, before any of the instalment notes became due, and before there could be a breach of the condition. And, further, although the deed of the 22d of March, 1839, contained no express stipulation, that, on breach of the condition, the trustees should have power to sell the property and pay the debts from the proceeds, yet, as that deed expressly referred to the agreement of the creditors of July 1st, 1838, by which they acceded to the proposals of Crocker and Richmond, the latter conveying the property in question to the trustees, in trust to hold and dispose of the same, and with the proceeds to pay the debts, in case Crocker and Richmond should fail to pay them, we suppose that the two deeds are to be construed together, and that although the trust to sell and pay the debts is not expressed in the mortgage, yet as it is expressed in the deed therein referred to, and in pursuance of which the mortgage purports to be given, the trustees have the power. Indeed, it is that power, which the trustees and mortgagees are called upon, by this suit, to execute, by distributing the proceeds of the mortgaged property in their hands among the creditors of Crocker and Richmond, after the failure of Crocker and Richmond to pay their notes, and the consequent breach of the condition of the mortgage. Although Crocker and Richmond, therefore, might hope to pay the first instalment notes, and perhaps the succeeding ones, yet the arrangement contemplated a direct and easy mode, by which the mortgaged property should be made available for that purpose through the trustees, in case Crocker and Richmond should be unable to pay the first, or after instalments of their debts.

From this view of the provisions and terms of the trust deed, it follows, that all that part of the debt of Crocker and Richmond, which was paid by the payment of their instalment notes, must be considered as paid by Crocker and Richmond out of their own funds and means, (those reserved or

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otherwise, it makes no difference,) and not, either actually or constructively, out of the trust fund. Therefore, although the debts of Crocker and Richmond are thereby released *pro tanto*, and creditors can only claim for the balance, from whatever source, or by whatever means, the debts may have been diminished, yet such a payment is not one, which, in any other way, diminishes the claim of creditors on the fund for the balance of their debts.

And, so, if a creditor has received more than one third of his debt, yet if not received from the trustees, or out of the fund, the excess over one third merely diminishes the debt *pro tanto*, and cannot be considered as a payment, in advance, out of the fund, to be deducted from the dividend of such creditor.

The amount actually due to any creditor at the present time, on a debt which existed April 12th, 1837, reduced in any mode, by the application of securities, or by payments by Crocker and Richmond, or otherwise, not being received of the trustees, is the measure of his claim on the fund.

Indeed, we are not aware that a claim is made on the part of the trustees, for having paid any of the debts of Crocker and Richmond, after condition broken, and pursuant to the trust, other than this; that they released certain of the trust property to Crocker and Richmond, to enable them to meet their first instalment notes; but, for the reasons already alluded to, and for others to be stated hereafter, we do not consider this as a payment pursuant to the trust.

The view of the subject last taken disposes of the question of Mr. Rotch's claim. We think he is entitled to prove for the balance of his debt; but that he has no claim to be allowed one third thereof, out of the fund, in full, before any payment to those creditors, who have received of Crocker and Richmond one third of their debts. The master's report in this respect is affirmed in both particulars.

VII. Our attention is next called to the exceptions taken by the plaintiffs and other creditors to the accounts of the trustees; in which the creditors insist that the trustees should

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be charged to a greater amount than they are charged by the master in his report.

1. The creditors claim that the trustees should be held responsible for eighty-four shares in the stock of the Taunton Manufacturing Company, embraced in the assignment and valued at $58,906·25. It appears by the facts reported, that, at the time of the assignment, these eighty-four shares were pledged to Willard and West for $8500. The trustees had no money or means with which to redeem them; and, in point of fact, the shares never were redeemed, but were subsequently sold, for a price considerably less than the sum for which they were pledged; so that the right of redeeming them, which was all that the trustees took under the assignment, was utterly worthless. The master reported, that the trustees were no further accountable in respect to these shares; and we are of opinion, that the decision was correct, and must be affirmed.

2. The creditors demand, that the trustees should account further for two hundred shares in the Cohannet Bank. It appears, by the assignment, that two hundred shares of this stock were conveyed to the trustees, subject to a lien thereon by the bank for $10,000. The master discharged the trustees from their liability to account therefor, on the ground, that the shares did not stand in the names of Crocker and Richmond. But the court are of opinion, that the trustees are chargeable with the par value of these shares, subject to the charge of $10,000, in favor of the bank. It is true, the stock did not stand in the names of Crocker and Richmond, but had been transferred to Milton Barney, to be held by him in trust for the bank, to secure the $10,000, and as to the residue for Crocker and Richmond, as the general owners thereof, subject to the lien of the bank. Crocker and Richmond were recognized as the general owners, and received the dividends. One hundred of these shares were afterwards applied to pay the debt of $10,000, for which they were pledged, and the residue went to the use of Crocker and Richmond. All the facts, respecting the ownership of these

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shares, were well known to the trustees. We are therefore of opinion, that the exception to the master's report, discharging them from their liability for these shares, must be sustained, and that the trustees must be charged therewith. There is nothing in the case to show that they could not, at any time, have applied a part of the shares, as they were afterwards applied, to discharge the lien, and thus have enabled themselves to hold the residue of the stock for the purposes of the trust; and we think it was their duty to have done so.

3. The creditors require the trustees to account for twenty-four shares in the Weymouth Iron Company. It appears, that, at the time of the assignment, Crocker and Richmond had subscribed for twenty-four shares in the stock of this company, and had advanced $3600 thereon, but that the certificates thereof had not been issued; and that their interest in the shares was included in the assignment, which provided that the certificates, when issued, should be delivered to the trustees. This company was successful, and the right to these shares was afterwards sold by Crocker and Richmond at an advance. It is not shown, that the trustees ever asked for these certificates, or gave notice to the company of the transfer to them, or took any means to avail themselves of this interest of $3600. The court are of opinion, that the trustees are liable to be charged for this item, as a part of the trust fund, and that the decision of the master, exempting them from all liability therefor, must be reversed, and the exception to that part of his report sustained.

VIII. The master proceeds to consider the trustees' account and answer, in which they pray to be exempted from further accounting for certain items of property, on the ground, that the property was of no value. Two items only are now in question:

1. One hundred and twenty shares in the stock of the Bristol Print Works;

2. One hundred and forty shares in the stock of the Taunton Iron Company.

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In regard to these shares, it appears, that the corporation known as the Bristol Print Works was embarrassed; and that the shares therein could not be sold, and were utterly worthless.

The creditors contend, that, according to the terms of the trust deed, there was a breach of the condition in July, 1839, in consequence of the non-payment of some of the first instalment notes; and that thereupon it became the duty of the trustees immediately to sell all the trust property, and that failing to do so, they must be held responsible for its market value at that time.

But the court cannot sanction this conclusion. It does not appear, that there was any breach of the condition in July, 1839, or, if there were, that notice of it was given to the trustees; and, if a breach of the condition had then occurred, it was not the duty of the trustees to sell all the trust property, at the then market price, on pain of being held personally liable. Even after condition broken, some discretion was to be exercised by the trustees, as to the time and mode of sale, and they could only be held responsible for good faith and sound judgment.

Upon the facts, as reported by the master, the court are of opinion, that the shares in the Bristol Print Works, and also the shares in the Taunton Iron Company, became utterly worthless; and that the decision of the master, holding the trustees no further accountable therefor, was correct.

IX. The creditors also object to the claim of the trustees to be allowed the sum of $67,614, for that amount of the notes of Crocker and Richmond, taken up by the application of funds advanced by the trustees to Crocker and Richmond, to enable them to pay the first instalment notes.

The first item, in the trustees' account of payments and expenses, is a charge of $67,642·20, for that amount of Crocker and Richmond's first instalment notes, "taken up by sale of Taunton Railroad and Taunton Iron Company's stock," which, being diminished by $28·20, paid by Crocker and Richmond, leaves an item of $67,614.

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This sum exactly corresponds with the first two items in the account of sales of trust property, namely, eighty-one shares Taunton Railroad, $7614, and sixty shares Taunton Iron Company, $60,000, making together $67,614.

It appears, by the master's report, that the real transaction was as follows. When the time of payment of the first instalment notes drew near, Crocker and Richmond applied to the trustees to release a part of the property in their hands, in order to enable them to meet this first instalment. After some hesitation, the trustees acceded to the request and did release to Crocker and Richmond eighty-one shares of the Taunton Railroad stock, valued at $7614, and sixty shares in the Taunton Iron Company, valued at $60,000; upon the understanding, that Crocker and Richmond should place in their hands an equal amount of notes given by Crocker and Richmond for their first instalment. After payment of the instalment, by Crocker and Richmond, these notes were selected by the book-keeper, not as the notes specifically paid by these funds, but as a part of the aggregate of notes, to secure which the deed was given.

Now, with the view which the court take of this deed, this was a misapplication of the funds by the trustees, for which they must be held answerable. It was not an application under the trust or authorized by it; it was made before the payments became due, and of course before any breach of condition; and it was not paid to the creditors, but to Crocker and Richmond, who paid the notes to the creditors, as, by the terms of the deed, they were bound to do. In every point of view, in which we can consider the subject, these transfers of shares to Crocker and Richmond were not under and in pursuance of the trusts of the deed, but in violation thereof; and the court are therefore of opinion, that the trustees are liable to account for these shares, and that the decision of the master in that respect must be reversed.

At the same time, however, it is proper to consider, that the real ground on which the trustees are chargeable is, that without just authority they parted with a portion of the

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trust property. It appears, that a part of this property consisted of sixty shares in the Taunton Iron Company, valued at $60,000. But, from other parts of the case, it appears, that the trustees were not bound, if indeed they were authorized, to sell these shares at that time; and that the shares soon declined in value, and ultimately became utterly worthless; so that if the trustees had retained them, they would have been of no more value than the one hundred and forty shares which they did retain. If this be a true view of the facts, as we think it is, then, as to these sixty shares, the trustees are responsible; but if the stock were of no real value, their parting with the shares in the manner stated did not diminish the fund, and their liability for the same is consequently merely nominal.

There is nothing in the case to show, that the Taunton Railroad shares were not of the full value, at which they were estimated, and for this amount the trustees are answerable.

X. Another question, arising on the report, respects the compensation claimed by the trustees. In the first place, they claim an allowance for services under the first assignment. The master reported against their claim for an allowance on that ground; and, upon a review of the case, the court are of opinion, that this decision was right.

The trustees also preferred a claim for services under the last assignment, a part of which has already been paid out of the fund. The master allowed their claim. Upon a review of the whole case, the court are of opinion, that the sums allowed are too high, and that, instead thereof, the sum of $5000 be allowed to the trustees for their services, and credited to them in their account.

It should be added, in reference to the claim of the trustees to be allowed for notes paid and taken up by them out of the trust fund, that we have proceeded on the ground that they advanced money, before a breach of the condition, to Crocker and Richmond, to enable them to take up their notes. But if, in point of fact, after a breach of the condition, the trustees themselves paid and took up notes, secured by the mortgage

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and trust fund, they would then stand on a very different footing. Perhaps it would be injurious to other creditors, to allow them in full, because it was their duty to distribute the fund equally, if it were not sufficient to pay all in full, and a payment to one creditor, of more than his distributive share, would be in their own wrong.

But we think that such notes should be proved, and that if the amount was received of the trustees, it must be considered as a payment by them in their own money, and they must account for the excess. But as the facts are not stated, this suggestion is made by way of caution, and with a view to a future inquiry, whether any such payments have been made.

A decretal order, in conformity with the foregoing opinion, was drawn up accordingly, and entered in the cause, by order of the court.

CATHARINE LINDA *vs.* ERASTUS D. HUDSON.

An action on the case, for causing a writ of *habeas corpus* to be issued and served upon the party therein alleged to be restrained, without his authority and against his consent, cannot be maintained, if it appear, that the complaint was made by authority from the plaintiff, and at his request, expressed either directly to the defendant, or indirectly through some other person.

THIS was an action on the case, in which the plaintiff alleged that the defendant, without authority from her, made a complaint to a judge of this court, in August, 1845, for the purpose of obtaining a writ of *habeas corpus*, in her behalf, on the ground, that she was imprisoned and restrained of her liberty; and that a writ of *habeas corpus* was issued accordingly, and delivered to an officer, by whom the plaintiff was taken into custody, and carried before the judge by whom the writ was issued, without and against her consent.

It appeared, from the evidence given on the trial, which

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was before *Wilde*, J., that the plaintiff was a woman of color, who had been brought into this state from one of the southern states, in which she was held as a slave by the person by whom she was brought here, and in whose service she then was.

It further appeared from the testimony of one Ruggles, that, in August, 1845, the witness was a servant in the family of a gentleman, who was then at a public house in Springfield, where the plaintiff was with her master and his family, and that the witness there met the plaintiff at the servants' table; that the plaintiff, having heard that the witness had been a slave, and was then free, entered into conversation with him, when the white servants had left the table, and said to him that she should like to be free also; that, afterwards, during the same day, she again expressed the same wish to him; that, in consequence of this conversation, he applied to the defendant and made known to him the situation and wishes of the plaintiff; that the defendant and witness thereupon employed an attorney to draw a petition for a writ of *habeas corpus;* that, before any further proceedings took place, the plaintiff's master left Springfield and went to Northampton with his family, taking the plaintiff with him; that the witness went the next day to Northampton, in the service of his master, and, while there, waited on judge Dewey with the defendant for the purpose of signing and presenting the petition for a *habeas corpus*, on behalf of the plaintiff; and that, whilst waiting at the judge's house for this purpose, he perceived that his master was about to depart from Northampton, and, in consequence, left the judge's without signing the petition.

It further appeared, that the defendant thereupon applied to the plaintiff's master, stating to the latter, that he understood he had a slave there, and requested leave to speak with her, in order to inform her, that, in this state, she could take her freedom, if she chose; that the master replied that he had a slave, but that the defendant should not see her; and that the defendant then returned to the judge and signed the

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petition, on which the writ was issued and served, as already stated.

When the plaintiff was brought before the judge, she was informed by him that she was free, if she chose to be so, and that she could stay with her master, or leave him, as she pleased. The plaintiff said she knew she was a slave, but chose to remain with her master, and then went away with her master and mistress.

Evidence was introduced, on the part of the defendant, to show that the witness, Ruggles, had said, that, when at Springfield he had no chance to have conversation with the plaintiff, — that he intended to have an interview with her at Northampton, — that she was a pretty girl, and he would like to get acquainted with her, — and that he was sorry he was not able to do so at Northampton.

The judge, before whom the cause was tried, being of opinion, that, upon the evidence introduced, (the material parts of which are substantially stated as above), the defence could not be maintained, directed the jury accordingly, and a verdict was thereupon returned for the plaintiff.

The verdict is to be set aside, and a new trial granted, or judgment is to be rendered on the verdict, according to the opinion of the whole court.

The cause was argued at a former term, by *Wendell Phillips*, for the defendant, and by *F. Webster & J. P. Healy*, for the plaintiff.

Shaw, C. J. The *gravamen* of the charge in the declaration is, that the petition to the judge, purporting to be made in the plaintiff's behalf, was presented by the defendant, without her authority, and that by means thereof she was taken into custody, and carried before a judge, against her consent.

Upon a revision of the testimony in the case, the court are of opinion, that there was evidence for the jury to consider, on the question of fact, and that the case should have been left to them, to decide, upon the evidence, whether the complaint and petition made by the defendant, and upon which

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the writ of *habeas corpus* to bring up the plaintiff was issued, were so made at her request and for her benefit; with instructions, that if they were so made by the defendant, by her authority and at her request, either directly to himself, or indirectly through another person, the defendant was not liable in this action; and that otherwise they should find a verdict for the plaintiff. The verdict, therefore, will be set aside, and a new trial granted.

SPRINGFIELD CARD MANUFACTURING COMPANY *vs.* NATHANIEL WEST.

In a *scire facias* against bail, it is no defence, that the defendant in the original action, at the time of his arrest, was the *chargé d'affaires* of this government to a foreign country, and was then on his way thither to enter upon the duties of his office.

THIS was a *scire facias* against the defendant, as the bail of Henry W. Ellsworth, in a suit, on which judgment had been rendered against him by default after an appearance. The defence specified was, that Ellsworth, at the time of the commencement of the original suit, was a public minister, namely, *chargé d'affaires* of the United States to and at the kingdom of Sweden, and was then busied and proceeding in the discharge of his duty as such; and that by the constitution and laws of the United States, the supreme court thereof have sole and exclusive jurisdiction of all cases affecting ambassadors, public ministers, and consuls. In order to establish his defence, the defendant offered evidence to prove, among other things, that, at the time of the arrest, Ellsworth was on his journey towards the court of Sweden, in fulfilment of the duties of his appointment.

The plaintiff objected, *first*, that the clause of the constitution referred to did not apply to public ministers appointed by this government, but to those appointed and sent hither by other governments; and, *second*, that Ellsworth, by

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appearing in the original suit, and submitting to the jurisdiction of the court, without pleading in abatement, or otherwise objecting to the jurisdiction, had waived his right, if he had any, to make that objection, and the defendant could not set up a ground of defence which had been so waived. The court of common pleas, *Wells*, C. J., presiding, rejected the evidence, and the defendant filed exceptions.

A. H. Fiske, for the plaintiffs.

There was no appearance for the defendant.

By the Court. As a general rule, matter cannot be pleaded in bar, on a *scire facias*, which would have been a good defence to the original action. The judgment is conclusive. *Wilcox* v. *Mills*, 4 Mass. 218; *Henriques* v. *Dutch E. I. Co.*, 2 L. Raym. 1532, commented upon by Nelson, J., in *Welland Canal Co.* v. *Hathaway*, 8 Wend. 481. The bail is estopped from denying that his principal was liable to arrest. *Stever* v. *Sornberger*, 24 Wend. 274. Where a foreign consul was sued in a state court, and judgment went against him by default, the bail were not allowed, on a *scire facias*, to plead the official character of the original defendant, in defence; they were estopped by the judgment. *Hall* v. *Young*, 3 Pick. 80. *Exceptions overruled.*

Samuel D. Blood & another *vs.* Francis Robinson.

An award of arbitrators, appointed by a submission before a justice of the peace, pursuant to the Rev. Sts. *c.* 114, and returned to the court of common pleas, may be recommitted to the arbitrators, with directions to amend the award, without rehearing the parties on the merits, by certifying whether the arbitrators were all present at the hearing and adjudication.

In this case, which was a writ of error, argued by *Ed. G. Loring*, for the plaintiffs, and *D. A. Simmons*, for the defendant, the facts are sufficiently set forth in the opinion of the court.

Shaw, C. J. In error from a judgment of the court of common pleas for this county, January term, 1845, on a report

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of arbitrators under a justice's rule. It appears by the record, that the submission was made in the usual form (as provided in the statute) to three arbitrators, and that the award was made and signed by two of them only. The award was then recommitted by the court to the arbitrators, to certify whether they were all present at the hearing and adjudication, without a rehearing of the parties upon the merits. Thereupon, at the same term, the same award was returned, with a certificate of the three, that all the arbitrators attended at the hearing, but that one did not concur with the majority, and for that reason did not sign the award. The error assigned is the order of the court recommitting the award, to certify a fact, without a rehearing of the parties on the merits.

The argument against the validity of this judgment is founded on the Rev. Sts. *c.* 114, § 9, which provides, that the award may be accepted or rejected, or may be recommitted to the same arbitrators for a rehearing by them. It is argued from the last clause, that if the court recommit the award, it must be for a rehearing. But we think this argument is not well founded. Here are no negative words; it is an enabling, not a restrictive clause. If it stood alone, it might seem, by implication, to limit the power of recommitment to the purpose of a rehearing. But a general power is given to the court, in the preceding section (§ 8), respecting an award returned under a justice's rule, which provides, that "the court shall have cognizance thereof, in the same manner, and the same proceedings shall be had thereon, as if it had been made by referees, appointed by a rule of the same court." This provision is broad enough to give the court, to whom such an award is returned, the fullest power over the award, and, amongst other things, to enable the court to recommit, generally or specially, as the case may require.

The first provision in the revised statutes, cited above, § 9, seems to have been introduced in this way. The eighth section, giving the court cognizance, &c., was borrowed from the old statute of 1786, *c.* 21, § 3. Under that statute, it had been repeatedly decided, that the court could recommit

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the award, for the purpose of amendment, in matter of form or for any other sufficient cause. *Boardman* v. *England*, 6 Mass. 70; *Whitney* v. *Cook*, 5 Mass. 139; *May* v. *Haven*, 9 Mass. 325. Still, as the authority of arbitrators under a justice's rule is derived more immediately from the act of the parties, whilst the authority of referees under a rule of court, made in a case pending, is derived from the court, it may have been doubted whether a court, on a report under the former, might, in effect, make a new rule of reference for a rehearing on the merits; to remove this doubt, — to give in express terms a power, which might be and probably would have been implied from the provision in § 8, — a new clause was introduced by § 9, giving to the court, in terms, the power to accept or reject, or recommit for a rehearing. This provision was no doubt designed, as in many other instances, to make an existing rule of law clear and express, which before rested in implication or inference from more general provisions, and not to make any new rule.

We are of opinion, that the court of common pleas had full power to recommit the award, for a special purpose, and with a limited authority, to the arbitrators, as well as for a rehearing on the merits; and that the award, when again returned as the award of the major part of the arbitrators, was a good award, the judgment upon which was not erroneous.

Judgment affirmed

COMMONWEALTH *vs.* SAMUEL MORRIS.

Where, on the trial of an indictment for adultery, a witness for the prosecution testified to acts of familiarity between the defendant and his alleged paramour, occurring about the time of the offence as charged, and, on cross examination, the witness left it doubtful whether the acts testified to might not have occurred a year previous, it was held, that the doubt thus raised as to the time did not render the evidence incompetent, however its effect might be thereby diminished.

A paper, purporting to be a certificate of a marriage solemnized in another state, by a clergyman resident there, but not authenticated in any manner, is not admissible, under the provisions of the statutes of 1840, *c.* 84, and 1841, *c.* 20, on the trial of an indictment for adultery, to prove the fact of marriage, "as circumstantial or presumptive evidence, from which the fact may be inferred," though such paper be derived from the possession of the wife of the defendant.

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Commonwealth v. Morris.

The question, whether a verdict ought not to be set aside as against evidence, cannot be raised on a bill of exceptions.

The defendant, having been convicted in the municipal court of the crime of adultery with one Abby Dow, brought his case to this court upon exceptions taken to the rulings of the judge before whom the trial took place.

The bill of exceptions set forth, that, on the trial,

"The government was allowed to introduce a paper purporting to be a certificate of marriage of the defendant with one Mary Ann Peterson, and which had been in her possession until produced on the trial, but which was not in any way proved to be a true one, or any one, as a circumstance, from which, with others, the marriage might be inferred.

"The act charged was a single act, alleged to have been committed on the fourteenth day of May, eighteen hundred and forty-six, and the government, having introduced evidence to that point, was allowed to put in evidence of familiarities of the defendant with Dow, occurring about said time. One of the witnesses, who testified on the direct examination to acts of familiarity committed at or about the time set forth in the indictment, testified, on the cross examination, to circumstances tending to show that there was some uncertainty as to the time, and that these acts might have occurred a year before the alleged act.

"Abby Dow, called as a witness by the defendant, admitted the truth of every charge proved against the defendant, and swore that she never had any criminal connection with him. Her testimony was not directly impeached, but the credit of it left to the jury, with this instruction from the court, that if they believed her, they should acquit the defendant."

The certificate, it was admitted, purported to come from a clergyman, resident in another state, and to be evidence of a marriage there solemnized.

M. S. Chase, for the defendant. The certificate would not be admissible, as evidence, in the English courts. *Morris* v. *Miller*, 4 Burr. 2057. Nor in the courts of this commonwealth, previous to the statutes of 1840, *c.* 84, and 1841.

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c. 20. *Comm'th* v. *Norcross*, 9 Mass. 492; *Ellis* v. *Ellis*, 11 Mass. 92; *Comm'th* v. *Littlejohn*, 15 Mass. 163; *Ham's Case*, 2 Fairf. 391; *Wedgwood's Case*, 8 Greenl. 75.

By the statutes above mentioned, it is enacted, that, in all cases, in which it shall be necessary to prove the fact of marriage, evidence of the admission of the fact by the party against whom the process is instituted, or of general repute, or of cohabitation as married persons, or any other circumstantial or presumptive evidence, from which the fact may be inferred, shall be received as competent evidence.

But the paper in question cannot be admitted, under this statute, as circumstantial or presumptive evidence. It is not in itself evidence of any description; nor could it become so in any other manner than by being derived from the custody of the party to be affected by it. 1 Greenl. Ev. § 463; Hubbock, Ev. to Succ. 258, 259. If it had come from the possession of the defendant, it might have been evidence against him; but coming from the possession of the wife, it could only affect her.

To the second point of the exceptions, the counsel cited 1 Greenl. Ev. § 52; 2 Same, § 47; *Stante* v. *Pricket*, 1 Camp. 473; and contended, that, on the testimony, the judge should have directed the jury to disregard the whole evidence of the witness.

S. D. Parker, (county attorney), for the commonwealth.

1. The certificate, purporting to be the official act of the person by whom it was signed, was admissible under the statutes, as in itself a piece of circumstantial evidence; but, at all events, it was so, within the rule above stated, as a paper coming from the custody of the wife, which, in contemplation of law, no divorce having taken place between the parties, was the possession of the husband.

2. If the evidence of the witness, as to acts of familiarity between the defendant and Abby Dow, was somewhat qualified as to time, on the cross examination, it still had some tendency to prove the commission of the offence, and, consequently, could not properly have been excluded.

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3. The credibility of Abby Dow was fairly left to the jury.

By the Court. This was an indictment for adultery. After conviction several exceptions were taken to the directions of the judge who tried the cause.

1. One arises in this way. The prosecution offered evidence of familiarities of the defendant with Abby Dow, (with whom the adultery was alleged to have been committed), at or about the time of the offence charged. On cross examination, the witness left it doubtful as to the time, so that the acts referred to might have occurred a year before. It is objected, that this evidence ought not to have been received. It certainly could not have been rejected, as incompetent, when it was offered, for it was offered to prove acts about the time; and the nearness of time is only a circumstance affecting its effect, and not its competency. If the time be brought into doubt by the cross examination, it was for the jury to consider.

2. It was objected, upon the evidence, that the defendant ought to have been acquitted. This is not a motion to set aside a verdict, as against evidence, nor is the evidence reported with that view; such a question cannot be raised on a bill of exceptions. The bill states, that Abby Dow, called as a witness by the defendant, admitted the truth of the charges proved against the defendant, but denied the criminal intercourse. Her testimony was not directly impeached, but her credit was left to the jury, with directions to acquit the defendant, if they believed her. This instruction was certainly favorable to the defendant, and he cannot object. It is difficult to perceive how her admissions of familiarities of the defendant with her entitled her to any increased credit, or how the jury could have acquitted him upon her testimony, if they did not believe her.

3. One other exception is, that a certificate, purporting to be a marriage certificate made by a clergyman of another state, was offered by the prosecution, to prove the defendant's marriage, and was objected to, but admitted. We are of

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opinion, that this paper, wholly unauthenticated, was not competent evidence, and ought not to have been admitted. And it received no additional weight by coming from the custody of the woman alleged to be his wife. She could not be a witness against her husband, and her production of the paper, not verified or proved, did not make it evidence against him. It was said, that it was used only as a circumstance, in connection with other proof. If the other proof were sufficient without it, the certificate was unnecessary and immaterial; if not, then it had weight as judicial proof, when it should have had none, and, in the minds of the jury, might have turned the scale.

Verdict set aside, and case remanded to the municipal court, for a new trial.

ANDREW DRAKE *vs.* JOHN CURTIS.
TISDALE DRAKE *vs.* SAME.

The provision of the Rev. Sts. *c.* 93, § 14, that when the demandant, in a real or mixed action, shall die before final judgment, his heir may appear and prosecute the suit, does not extend to a devisee of such demandant.

It is not erroneous in a judge to decline instructing the jury, in the manner requested by either party, when the instructions prayed for are not founded in the evidence, or are not applicable to the case.

The entering upon unenclosed flats, when covered by the tide, and sailing over them with a boat or vessel, for the ordinary purposes of navigation, is not such an open, notorious, exclusive and adverse possession, as is necessary to constitute a disseisin.

THESE were real actions, brought for the recovery of a certain wharf, dock and flats in Boston. The demandant in the first entitled action having died, leaving a will by which he devised his real estate, including the premises in question, to the demandant in the second action, the latter made a written application to the court, for the purpose, and was thereupon admitted, (subject to the opinion of the whole court,) to come in and prosecute the suit.

Certain preliminary proceedings having taken place, by which the legal side lines of the demandants' estate across the flats had been settled, — which proceedings are sufficiently

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stated in the opinion of the court, — both causes were submitted together to the same jury upon the question of disseizin, and were tried before *Wilde*, J., at the November term, 1846. The report of the judge is substantially as follows:

The tenant, in order to show a disseizin of the demandants, read in evidence, among others, a deed from Jabez Hatch to himself and Thomas Ridley, (whose estate had since become vested in the tenant by mesne conveyances,) in which deed, the premises conveyed, including the demanded premises, were described by metes and bounds, and then introduced the testimony of William H. Prentice, Samuel Abbott, and others, as to the extent, duration, and manner of occupation and use, of the wharf, dock and flats in question, by Jabez Hatch and those (including the tenant) who held under him.

The first named witness testified, that he had known the premises since the year 1803; that he lived with Mr. Hatch, until the year 1806; that, from 1806 to 1809, he lived in the house at the head of Drake's Wharf,* and carried on business on Hatch's South Wharf; that he had lived in South Street and East Street ever since, and had been familiar with the premises. He described the extent and dates of the erections and additions to the wharf, from time to time, and the use of the dock and flats and sides thereof; and, among other things, stated, that vessels frequently lay at the end of the wharf, to wait and get ready to go into the sides, and take off parts of their loads; that he had himself taken wood from vessels lying at the end of the wharf, before the Cobb Wharf was built; and that he had seen them lying at the end of the Cobb Wharf.

Samuel Abbott, who was eighty-five years of age, and had lived in Sea Street (from whence he removed twenty years ago) thirty-five years, testified, that he did his business in the territory of Mr. Hatch, and described the time when and the distance to which the wharf had been extended, and the use and occupation of the docks, wharf and flats. He stated that

* This and other references, in the statement, to local objects which could only be fully explained by means of a plan, are not essential to an understanding of the cause.

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"he had seen vessels at the end of the wharf, two or three deep, when the weather was bad, or a want of wind."

Upon this, with other evidence, not material to be here stated, derived from the plans, deeds and documents, which were exhibited and used on the trial, the tenant requested the judge to instruct the jury in the following terms:

"That if the jury are satisfied, on the whole evidence, that the tenant and those under whom he claims entered upon and took and held visible and exclusive possession of part of the demanded premises, and exercised acts of open and exclusive ownership therein; and, as to the residue of the premises, used and enjoyed the same by passing over them with vessels to and from his wharf, with intent thereby to possess and hold the whole premises, on a claim of right, and by regular paper title, up to the present line; and if the jury are further satisfied, that the demandants or those under whom they claim had full notice of such entry, possession and claim, and, by conveyances and other equivalent acts, recognized and yielded to such claim and possession, and that such possession had continued for thirty years before the commencement of this suit, it amounted to a disseizin of the whole premises, and that they ought to find a verdict accordingly for the tenant."

The tenant also requested the court to instruct the jury, that, upon the evidence in the case, it was competent for them to find a disseizin of the whole premises by the tenant.

The court declined giving the instructions thus requested, but instructed the jury, "that, as against the demandants, who were the true owners, the disseizin extended no further than the wharf, and the flats and dock occupied by vessels lying at the wharf; that, though there might not be sufficient evidence of vessels having lain at the end of the Cobb Wharf after it was extended in 1808, yet, as the purpose of a wharf was to have vessels come to and lie at it, the jury might infer, that the end of the wharf was so used, and might allow to the tenant, as a disseizor, space enough at the wharf to turn a vessel, or to lay two or three vessels there."

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Under these instructions, the jury returned a verdict, in each case, as follows:

"The jury find that the tenant has obtained possession of the wharf and flats in controversy, down to the end of the Cobb Wharf, as it now exists, and one hundred and twenty feet beyond. They also find the line of Sea Street to be the most easterly line as shown on the plans."

Formal verdicts were thereupon drawn up and entered, by direction of the court, in each case, that the tenant did disseize the demandant of a certain parcel of land or flats (describing the same), being parcel of the land or flats demanded in the suit, and that as to the residue, the tenant did not disseize the demandant.

If the court should be of opinion, that the instruction, as to the point of disseizin, was not sufficiently favorable to the tenant, a new trial is to be ordered on that point.

If the court should be of opinion, that the instruction, upon the facts proved, as to allowing the tenant room to swing a vessel, or to lay vessels at the end of his wharf, was incorrect, or that the finding of the jury did not warrant the verdicts entered, the verdicts are to be amended by the court, so as to conform to the law, and the rights of the parties.

These causes were argued partly at the bar, and partly in writing, by *D. Webster*, *S. Bartlett*, and *R. Choate*, for the tenant; and by *R. Fletcher*, and *B. R. Curtis*, for the demandants.

S. Bartlett, for the tenant.

An entry, under such a deed as that by which the tenant claims, makes the party entering a disseizor of the part entered upon; and the doctrine of the courts of the United States, and of some of the state courts, therein differing from the principles established in this commonwealth, extend the disseizin so created to the whole premises embraced in the deed. In the present case, however, it will not be necessary to revise the rule, which has heretofore been laid down by this court, respecting disseizin; but only to apply the same to the new state of facts involved in the tenant's prayer for instructions

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The instructions requested by the tenant assume the following facts, as the elements necessary and sufficient to constitute a disseizin: 1st, that the entry of the tenant, and his acts, as regards both the portion exclusively occupied by him and his predecessors, and that partially so occupied, were under a regular paper title, and a claim of right, which embraced and called for the whole premises; 2d, that the demandants had full notice of the entry and possession, on the part of the tenant, and of the extent and character of his claim, under that conveyance; and 3d, that the demandants, by conveyances and other acts, recognized and yielded to such claim and possession, on the part of the tenant.

1. Disseizin being dependent upon the intent of the party, the value of an entry under a recorded deed, or a paper title, containing definite boundaries, as compared with a mere intrusion, in its bearing upon the question of disseizin, must be determined by the intent. Where an entry is made without deed, the intent corresponds with the acts of the party. But, where it is made under a deed, the extent of the party's intention is determined by what the deed professes to convey. Hence it has been decided, in the courts of the United States, and in those of some of the states, that a disseizin effected under a claim of title, in virtue of a deed, or other instrument, is in general coëxtensive with the description of the premises conveyed. *Ellicott* v. *Pearl*, 10 Pet. 412; *Ewing* v. *Burnet*, 11 Pet. 41; *Jackson* v. *Porter*, Paine, 457; *Prescott* v. *Nevers*, 4 Mason, 326, 330.

There is no case, indeed, to be found in our own reports, founded in the distinction between an entry under a paper title, and a mere intrusion; but the distinction is clearly implied, though collaterally and incidentally, in the cases of *Allen* v. *Holton*, 20 Pick. 458, and *Kennebeck Purchase* v. *Springer*, 4 Mass. 416.

The precise point was raised and elaborately argued in the case of *Bates* v. *Norcross*, 14 Pick. 224, but the court declined going into the question.

The distinction made in some of the cases above cited,

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between conveyances of large tracts of wild land, and of farms or smaller tracts for improvement and cultivation, is a sound one. The tenant, in the present case, only claims a disseizin coëxtensive with the intent.

2. The weight, to which the fact of notice is entitled, as an element of disseizin, has not heretofore been passed upon. But it is the distinguishing characteristic of all acts necessary to constitute a disseizin, that they carry notice to the true owner and to all the world; and such has been the uniform current of the decisions. *Kennebeck Purchase* v. *Springer*, 4 Mass. 416; *Pray* v. *Pierce*, 7 Mass. 381; *Poignard* v. *Smith*, 6 Pick. 172; *Coburn* v. *Hollis*, 3 Met. 125; *Piper* v. *Richardson*, 9 Met. 155.

The doctrine of disseizin depends upon the intent of the disseizor, as settled by the terms of his deed, and upon the knowledge of such intent, by the disseizee; and, therefore, if acts be done by one claiming under a deed, which, if done by an intruder, would be equivocal, and notice of the character of these acts, and of the deed under which they are done, be given to the other party, such acts cease to be equivocal, and amount to a disseizin. So, where the acts done on a part of the premises are unequivocal, and those done on another part equivocal, the same consequence must result, provided the nature and character of the latter be brought home to the party.

3. The demandants' recognition, by their acts, of the tenant's claim, and their yielding thereto for thirty years, are tantamount to equivocal acts, with notice of their character, and of the claim under which they are done. See *Coburn* v. *Hollis*, 3 Met. 125.

As to the general question of disseizin, the counsel referred to Angell on Limitations, 415, 428, 431, 433, 440, 447; 19 Am. Jur. 41, 44, 262; *Boston Mill Corp.* v. *Bulfinch*, 6 Mass. 229; *Brimmer* v. *Prop'rs. of Long Wharf*, 5 Pick. 131; *Rust* v. *Boston Mill Corp.*, 6 Pick. 158; *Sparhawk* v. *Bullard*, 1 Met. 101; *Piper* v. *Richardson*, 9 Met. 155; *Jackson* v. *Woodruff*, 1 Cowen, 276; *Jackson* v. *Oltz*, 8

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Wend. 440; *Kennebeck Purchase* v. *Laboree*, 2 Greenl. 275; *Farrar* v. *Eastman*, 1 Fairf. 191; *Riley* v. *Jameson*, 3 N. H. 23; *Lund* v. *Parker*, Same, 49.

B. R. Curtis, for the demandant.

The preliminary question, as to whether the devisee was rightly admitted, depends upon the construction of the Rev. Sts. *c.* 93, § 14, and *c.* 62, § 2, the first of which gives the heir a right to come in, and the second puts the devisee upon the same footing with the heir.

The principal question has been argued on the ground, that if the proposition contained in the prayer for instructions was right, the refusal to give the instructions was erroneous. But, admitting the correctness of the instructions prayed for, as an abstract proposition, yet, if there were no facts in the case to call for them, or if they were not pertinent or relevant to the facts, the refusal was proper.

The party objecting to the ruling is bound to show, that such facts were in evidence, that the instructions prayed for referred to such facts, and that they were applicable to the case.

The *prima facie* aspect of the case was, that the demandants never yielded to the possession of the tenant. There was no evidence that they had ever done so. If the burden were on the demandants to show that they had never yielded, it would only be necessary for them to deny the existence of any such facts, and to ask the court to look at the evidence.

If the judge, who tried the cause, had given the instructions prayed for, he should have told the jury, at the same time, that there was no evidence before them, to which the instructions could apply.

It is said by the tenant's counsel, that the court are not called upon, by the argument for the tenant, in the present case, to decide otherwise than they have heretofore held, as to the law of disseizin. But the three elements, which he lays down, are not alone sufficient to constitute a disseizin. There must also be ouster or its equivalent.

Sailing over the premises with boats or vessels is not an act

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of ownership, but a use of the flats as a part of the great public highway of navigable waters, and cannot amount to a claim of possession. But the ordinance of 1641, under which the title to flats is claimed, provides for this very case, by saving the right to pass over the flats to other men's houses or lands. *Deering* v. *Prop'rs. of Long Wharf*, 12 Shep. 51, 64. The use of the flats, therefore, amounts to nothing, and the case must be so considered.

The question, then, is whether a fourth element is not necessary, to wit, ouster, in order to constitute a disseizin.

It is true, that, in the courts of the United States, and in those of some of the states, a different rule is held, founded in the ancient doctrine, that a feoffment with livery of seizin amounts to a disseizin. The principle was, that a charter of feoffment, with an entry under it, accompanied by livery of seizin, worked a disseizin. The courts alluded to, adopting this doctrine, have held that a deed of conveyance duly recorded was equivalent to a feoffment with livery, and consequently that an entry and possession under such a deed were coëxtensive with the description in the deed, and worked a disseizin of the whole.

In the case of *Bates* v. *Norcross*, 14 Pick. 224, the attention of the court was called to the old doctrine, but they did not adopt or sanction it. They say: "Whether a feoffment would have the effect supposed, at the present day, is a question upon which learned jurists disagree, but which it is not necessary to consider in the present case."

The authorities cited on the other side, being founded in the old doctrine, that a deed of feoffment, with livery of seizin, effects a disseizin, are not applicable here, unless the court should now be willing to sanction and adopt that doctrine. If not, it is impossible to avoid the conclusion, that ouster is a necessary element to constitute a disseizin as against the true owner. *Kenn. Purch.* v. *Springer*, 4 Mass. 416; *Brimmer* v. *Prop'rs. of L. W.*, 5 Pick. 131; *Coburn* v. *Hollis*, 3 Met. 125; *Slater* v. *Rawson*, 6 Met. 439; *Jackson* v. *B. & W. R. Corp.*, (not reported, but referred to by Wilde, J., 1 Met. 99

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and 6 Met. 447);* *Sparhawk* v. *Bullard*, 1 Met. 95; *Bost. & Wor. R. C.* v. *Sparhawk*, 5 Met. 469; *Wheeler* v. *Stone*, this volume, 313.

But this doctrine is aside from the question in the present case; there being positive facts in evidence, which show that the instructions prayed for were properly refused. The demandants had always been in possession of a part of the premises, having entered under deeds, which conveyed a true title to the whole; the tenant had entered and been in possession of a part, under what was not a true title; and a part remained vacant. The principle is, that where two parties are in possession, each of a part of the land, and a part is vacant, the law attributes the seizin to him who is the true owner. Litt. § 701. This principle was recognized and applied in the cases of *Brimmer* v. *Prop'rs. of L. W.*, 5 Pick. 131; *Green* v. *Liter*, 8 Cranch, 229, 231, 250; *Barr* v. *Gratz*, 4 Wheat. 213; *Gibson* v. *Martin*, 1 Har. & J. 545; *Moss* v. *Currie*, 1 Dana, 266; *Harrison* v. *M'Daniel*, 2 Dana, 348; *Chiles* v. *Jones*, 7 Dana, 528; *Deering* v. *Prop'rs. of L. W.*, 12 Shep. 51, 64.

D. Webster, for the tenant, submitted the following argument in writing:

No suggestion having been made at the trial, that the tenant had not produced evidence sufficient to raise the question presented by the prayer for instructions, but the point having been ruled upon simply as a matter of law, and as supposing the alleged facts to be proved, it must now, of course, be so understood; for, if the judge had suggested any deficiency of proof to raise the question, his specific ruling upon that point might have been objected to, and that question reserved.

The prayer for instructions offered to prove all that was necessary to show a disseizin of the lower part of the premises in question, namely: 1st, an exclusive possession and seizin, by the tenant, or those under whom he claims, adverse

* This case will be found at the end of the volume.

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and continued a sufficient length of time; and 2d, sufficient evidence of notice to the true owner, and of acquiescence by him. There must be possession and seizin; mere standing off and claiming is not enough. The possession must be exclusive; if mixed, the seizin is according to the title. Possession is evidence of notice, according to its greater or less degree of notoriety; but proof of actual notice is, of course, the best evidence in all cases.

The tenant showed a possession of all as distinct from a mere claim to all. An entry on part, as and for all, under a deed calling for all, gives possession of all against every body but the true owner. Upon such possession, all possessory remedies attach. It proves an averment of seizin. It is regarded by the law as a fixed right *in re*, and is essentially different from a mere claim, under color of title; for such claim supports no remedy, even against a stranger, and exposes the party to no action by the true owner, except for slander of title.

But, it is said, that this is no possession at all as against the true owner, but a mere claim. The tenant maintains, on the contrary, that, as against every body, it is something more than a mere claim; that, as against strangers, it is a good right, to all intents and purposes; and that, as against the true owner, it is a possession, though not exclusive, or efficacious, unless accompanied by the circumstances of a sufficient notice that the party is in claiming the whole, and of a yielding up of possession by the true owner, in recognition of the possession and claim of the other party.

But it is certainly a possession, even against the true owner, as distinct from a mere claim. This is proved conclusively by the fact, that the true owner may sue the party entering, in trespass which he cannot do against a party merely claiming. And this he may do, not on the ground of election to regard himself disseized; but merely on proof of possession. It is a possession, therefore, which, on the one hand, gives possessory rights, and on the other, exposes the party to possessory remedies by the true owner.

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Some confusion has arisen from not distinguishing between the fact of possession, and the different effects of that fact, on the rights of others. The fact is the same, whoever may controvert it; but its legal influence is one thing on the rights of strangers, and another on the rights of the true owner.

However this may be, it is universally admitted that an entry on part, under a claim for all, gives seizin and possession of all, unless there be an actual adverse seizin, by the true owner; and what the tenant offered to show was precisely this, that, in the present case, there was no such continued adverse possession by the true owners. Upon notice that the tenant had entered and taken possession, claiming the whole, the true owners retired from the whole, and yielded up their possession and claim to the whole, in recognition of the possession and claim of the tenant.

To "yield" is "to give as claimed of right," — "to resign," — "to give up," — "to surrender to," — "to give way, to give place to." To "recognize" is "to admit with a formal acknowledgment." So that the words aver, that the demandants acknowledged the legal validity of the tenant's possession, and yielded up their own thereto. In other words, the language avers a complete transmutation of possession. The remarks already made show, that the possession which the tenant offered to prove was exclusive.

But the case goes further. The tenant offered to prove, not merely the visible and exclusive possession of a part, and the exercise of acts of exclusive ownership therein; but also that this possession and exercise were taken and had with a definite and specific intent and purpose, notified to and acquiesced in by the other party, namely, with intent thereby to possess and hold the whole premises on a claim of right. An entry on land is to be construed according to its intent; and it is particularly and directly alleged, in the present case, that the entry on part was intended to be a taking possession of the whole, and was so understood by both parties.

The tenant offered to prove, also, not merely the visible

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and exclusive possession of part, and the exercise of acts of ownership therein, with intent thereby to possess the whole, but that as to the residue, he used and enjoyed the same, by passing over it with vessels, with intent thereby to possess and hold the whole, on a claim of right. And this use and enjoyment, together with the intent which accompanied and qualified it, were fully known to and acquiesced in by the demandants.

Here, then, is a direct averment of possession and use of all the parts, according to their several natures and capacities. Doubtless, the mere sailing over flats, without proof of any claim and possession, or intent to claim and possess, does not amount to or evidence possession. All depends on the intent, and on the understanding, with which the thing is done; as the plucking a twig from a tree may be a wholly unimportant thing, or it may be the taking possession of a manor. A circumstance, therefore, which distinguishes this case from all others connected with flats, is, that the acts of sailing over, as well as all others done by the tenant, were done under a claim of ownership, and so known to be done by the right owner. The tenant offered to prove such passings over the flats, to and from his wharf, as amounted to a use of the flats. But a use of flats, in modes and for purposes far short of and other than erections or visible structures, may imply and evidence possession for all purposes and against every body. Such is the use of waters on flats, at the ends of wharves, for vessels to float, turn, or ground on. Such, also, would be the use of flats between wharves or piers, over which vessels might sail. And it is to be kept constantly and particularly in mind, that the demandants yielded their own use, in this respect, to the possession and use of the tenant; so that even if they sailed over the same flats, which does not appear, they did it in subordination to the tenant's claim and acknowledged right. The mere fact, therefore, that the use which the tenant offered to prove consisted only in sailing over the flats, does not prevent its evidencing the requisite possession.

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The case, therefore, on the part of the tenant, presents these distinct facts and points:

1. The tenant produced a deed covering all the premises.

2. He proved an open entry under the deed, and visible and permanent possession taken of a part, with intention, by such possession of part, to take possession of the whole; and this intention was known to and acquiesced in by the demandants.

3. He proved a use and occupation of the residue of the premises, according to its nature and capacities, with the definite intention thereby to possess the same, and this known to the demandants; thus working the legal possession thereof.

4. And, in general, that all the acts done by the tenant, with the intent and purpose which accompanied and qualified them, were distinctly known to the demandants, through the whole course of the thirty years.

5. That, with such notice, the demandants surrendered and abandoned all their own possession, in recognition of the fact, that the tenant had the possession and had it rightfully.

In conclusion, it may be observed, that when an actual possession has been taken of the whole, such as would be good against strangers, and going beyond a mere claim; then direct and actual notice to the true owner of such possession, and its acknowledgment by him, are as effectual to bar him, as if such notice had been given, by actual edifice or structure on or cultivation of the premises. Notice by structure, or enclosure, or cultivation, is constructive; but personal and direct notice, proved and acknowledged, is actual, and therefore higher and better than any constructive notice, and is conclusive.

R. Fletcher, for the demandants, replied in writing to some of the points in the written argument for the tenant.

The assumption in the argument for the tenant, that, at the trial, there was no suggestion of any deficiency of evidence to raise the question involved in the proposed instructions, is wholly erroneous. But the whole evidence is before the court, upon the report, and it is submitted, that it contains nothing

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to show a yielding of possession on the part of the demandants; so that any instruction, upon the assumption of such yielding, as a fact, would have been wholly irrelevant and aside from the merits of the case.

The position, that the facts assumed in the prayer must now be taken as proved, for the reasons stated in the argument, cannot be sustained or objected; because the court have all the evidence in the cause before them, and if the tenant can show that the instructions moved for were relevant or pertinent, he will have the same advantage therefrom, which he could have had upon a specific ruling against him on that point.

In the argument for the tenant, it is stated, "that the prayer offered to prove all that is necessary to show disseizin of the lower part of these premises." In this sentence, and in other parts of the argument, the prayer for instructions is spoken of as an offer to prove facts. But a prayer for instructions, on evidence actually in the case, is a very different thing from an offer to introduce evidence to any particular point. In this case, the instructions were requested on evidence already introduced, and no question arises upon any offer of proof.

One of the positions taken in the argument for the tenant is, that "The tenant used and enjoyed this portion of flats by passing over it with vessels, with intent thereby to possess and hold the whole on a claim of right; all which was known to and acquiesced in by the demandants."

There is no evidence, that the tenant used this portion of the flats in any other manner than the whole public had a right to use and did use them, by passing over them with boats and vessels. His acts, therefore, were in the exercise of a right enjoyed by him in common with all other persons, and entirely distinct from all title or claim of title to the soil. The intent, with which such acts are done, is wholly immaterial; it can only be material, when the act done is itself the exercise of a right in the soil. Sailing over flats covered by the tide cannot be regarded, in any sense, as an act of

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possession, and no intent whatever can make it so. The tenant might as well say, that he looked at the flats under a claim of right, and with intent to hold them, and thus acquired possession. Besides, there is no evidence to show that there was any such intent, on the part of the tenant, or that it ever entered his mind to hold the flats by sailing over them, or that he was sailing over them under a claim of ownership. Nothing appears to show that his intent was different from that of all others, — the demandants included, — in doing the same thing. Still less does it appear that any such intent, if it existed in the tenant, was communicated to or known by the demandant and acquiesced in by him.

Shaw, C. J. The first of these actions was a writ of entry, by Andrew Drake, to recover land, declaring on his own seizin, and the disseizin of the tenant. The demandant having died during the pendency of the action, leaving a will, purporting to devise his real estate, in terms which would embrace the premises, an application was made in writing, on the part of his devisee, for leave to come in and prosecute the suit.

This right was claimed in virtue of Rev. Sts. c. 93, § 14, which provides, that "in all real and mixed actions, if the demandant shall die before final judgment, his heir may appear and prosecute the suit, in the same manner, as if it had been originally commenced by him."

It was insisted, that a devisee is within the reason and equity of the statute, the object of which is to avoid unnecessary delay in the prosecution of suits. Some color is given to the argument by the terms of the statute of 1826, c. 70, § 1, which gave the right to come in to the heir, "or such other person as would, in case the action were abated, be entitled to commence the like action." Had this clause been adopted in the revised statutes, the argument would have derived some further support from the Rev. Sts. c. 62, § 2, which provides, that a party disseized of lands may devise them, or, if, after the devise, he be disseized, they shall still pass, and the devisee shall have the like remedy by entry or

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action, that the heir might have had. The words in the statute of 1826, following the word "heir," might perhaps, by description, be held to include "devisee," as such other person. But the statute of 1826 is in terms repealed; and the legislature, by retaining the provision for heirs, and omitting the other description, indicate their purpose to limit it to the case of heirs.

Upon the revised statutes, which now furnish the only rule on the subject, the case is certainly not within the words of the statute, and, in the opinion of the court, is not within its reason.

An estate of inheritance passes by law to persons fixed and designated as heirs, with all the qualities under which it was held by the ancestor. But an owner in fee may create new estates, in the whole or in any part of the land held by him; he may devise to one for years, to another for life, (the devisee's own or that of another), remainder in tail, remainder in fee, with contingent remainders, executory devises, with uses, powers, trusts, and every other species of depending interests. This consideration gives significance to the maxim, not always apparently intelligible, that a devisee takes as a purchaser. Instead of an estate of a fixed character, cast upon one by descent, by operation of law, there may be every species of estate carved out by will, as effectually, as if done by deed on a consideration paid. Under these circumstances, it would often be difficult for a court to ascertain who the person is, who stands in place of the heir, and whether he would be entitled to prosecute the same kind of action, which was pending at the time of the decease of the testator. We are therefore of opinion, that it was with a just regard to the difference between the case of an heir and that of a devisee, that the legislature confined the right to appear and prosecute a real action, on the decease of the demandant, to an heir, and that it is not given to a devisee. See *Brown* v. *Wells* 12 Met. 501.

But the main question in the case was that of disseizin. The case had before been under consideration by the court,

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and various points had been decided, upon the respective titles of the parties. The demandant having established a *prima facie* title by deed and the operation of the colony ordinance, respecting the rights to lands flowed by tide waters, it was contended by the tenant, that he and his ancestors had disseized the demandant and his ancestors, and held the estate, until the statute of limitations had barred the remedy of the disseizee, and all persons deriving title under him, so that by force of such disseizin, he had acquired a complete and indefeasible title. This being a question of fact, it was ordered to be tried by a jury; the trial to be confined to this question only. Such a trial has been had, and this case comes before the court on a report of that trial, and the questions reserved thereon.

The case then begins with the assumption, that the demandant has established a *prima facie* title, by deed, to the upland or shore bordering on tide water, to which the land in controversy would belong, as parcel, if not alienated and separated by a deed of the proprietor, or by a disseizin and lapse of time, which, in law, would work such alienation. Another assumption is, that the demanded premises consist entirely of flats, that is, land lying on the shore of a bay or cove, open to the sea, between high and low water line, covered by salt water at the flow of the tide, and left uncovered by water at the ebb. It was admitted or proved, and assumed on both sides, that the tenant was in possession of a wharf covering a portion of the flats in question, and that he and his predecessors have had a peculiar, not to say exclusive, possession of the sides of the wharf, and of the end thereof towards the sea, to place vessels thereon, attached and secured thereto, and kept there at the convenience of the owner, to receive and discharge cargoes. To this extent, the verdict was for the tenant. But, beyond this, he claimed a title by disseizin to flats lying around and beyond the structure of the wharf, and beyond the sides and end thereof, thus used for docking vessels; flats, over which the tide still flowed, unenclosed by piles driven into the ground, or by any other fixture.

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The report states the evidence offered at the trial, and refers to the deeds, plans, and other evidence offered at former hearings. By this evidence, it appears, that the demandant had a wharf, bounding on Boston harbor, which he and his predecessors had extended from time to time, and used as a wharf, occupying the sides and end for the dockage of vessels, beyond which, towards the sea, lie the flats in question, constituting part of the harbor of Boston, covered with water at every flood tide.

In considering this case, it will not be necessary to go at large into the vexed subject of what constitutes a disseizin of the true owner, where he does not elect to regard himself disseized for the sake of his remedy. All the authorities agree substantially in holding, that there must be a possession taken, which is open, notorious, exclusive, and adverse to the title of the owner. The differences seem to have arisen from the application of the rule to the condition and circumstances of various states, which, in regard to the law of real property, follow the rules of the common law. It was stated in argument, that, in some respects, the rules adopted in Massachusetts, in regard to such application, differ somewhat from those of the other states. But the rules thus referred to all apply to the case of land alike in its nature and qualities, in respect to title and possession, and subject to the same rules; but they do not apply to estates in Massachusetts, lying upon creeks, coves, and other places, about and upon salt water, where the sea ebbs and flows. The title to flats, under the colony ordinance of 1641, and the constructions which have been put upon it, is of a peculiar character. By the ordinance, it is declared, that "such proprietor shall have propriety to the low water mark, where the sea doth not ebb above one hundred rods, and not more wheresoever it ebbs further, provided that such proprietor shall not, by this liberty, have power to stop or hinder the passage of boats or other vessels, in or through any sea, creeks, or coves, to other men's houses or lands." By a grant of land thus lying about or upon salt water, the grantee takes a fee in the soil of the

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flats to low water, or one hundred rods, as parcel, and as incident to the upland, without words of description. The effect of the ordinance is, to make the upland extend to low water mark; proof of title to the upland, therefore, is *prima facie* proof of title to the flats. *Valentine* v. *Piper*, 22 Pick. 85, 94. But it is *prima facie* only, because, being an estate in fee, the owner may sell the flats without the upland, or the upland without the flats. *Mayhew* v. *Norton*, 17 Pick. 357. It follows, therefore, that, after a separation, by a conveyance of the flats without the land, a conveyance of the upland would not convey the flats.

But, though the riparian proprietor has thus a fee in the soil of the flats, it is limited and qualified by the proviso above stated. The construction of the ordinance, with the proviso, has been, that, although such proprietor has a fee in the soil of the flats, he holds it *sub modo;* he may build a wharf or other permanent structure upon it, or he may enclose it with rows of piles, so as to exclude other persons from sailing over it; yet, until he does so, whilst the tide is in, and the flats covered, it is public navigable water, like that which lies beyond one hundred rods, over which *all persons* have a right to pass and repass with their boats, and from which the owner has no legal right to exclude them, by notice, warning, or proclamation, or any act short of an actual exclusion, by an enclosure or wharf, with the dockage incident thereto. Any person, therefore, entering upon the flats of such riparian proprietor, with his boat or vessel, and using it for the ordinary purposes of navigation, commits no breach of the owner's close, subjects himself to no action of trespass, but is in the exercise of a right as perfect in its kind as that of the riparian proprietor. *Comm'th* v. *Charlestown*, 1 Pick. 180. Such was the nature of the estate, of which the tenant claimed title by disseizin, and a bar of any entry or action by the statute of limitations. Both parties offered evidence which is stated in the report; no evidence was offered and rejected on the ground of incompetency, or for any other cause.

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Upon this evidence, a prayer for instructions was presented to the judge, on the part of the defendant, which he declined giving, and this is the ground of exception. We can perceive no error in law, in withholding this instruction, because there was no evidence to call for or to warrant it. It is a good reason for declining to give the jury precise and special instructions, at the instance of either party, that they are irrelevant; that they turn on abstract questions of law, not applicable to the case in hand. Such instructions would have a tendency to divert the attention, if not to mislead the judgment, of the jury, as to the true questions for their consideration. It appears to us, confining ourselves, as we must, to the report, that there was no evidence in the case, to which several of the propositions, in the prayer for instructions, though correct in point of law, could be applied; and, therefore, the judge was right in declining to give the instructions prayed for; giving those instead, which, in his judgment, were applicable to the evidence.

It was urged in the able argument for the tenant, that, as the judge refused to give the instructions, we are now to assume that the facts thereby supposed were true, in order to test the correctness of the propositions contained in the instructions, in point of law. But we cannot consider such to be the course of proper practice. Where evidence is offered, with a view to prove a certain state of facts, and the evidence is rejected by the judge, on the ground, that it is not pertinent to the issue, and that the facts, if proved, could not avail the party tendering it, then, certainly, in revising the decision, we are bound in justice to assume, that the evidence, if it had been admitted, would have proved the case stated. But it is far otherwise, where the evidence is received, and the judge is called on to state the law in reference to the facts, which, in the opinion of the jury, the evidence proves. There must be competent and relevant evidence, tending to prove a state of facts; and, then, the judge must instruct the jury, hypothetically, that if, in their judgment, certain facts are proved by the evidence,

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then such would be the rule of law, applied to the facts so proved, and such the conclusions in which it results, affecting the rights in controversy. In no other way, where a general verdict is to be given, can the judge direct in matter of law, for which he is responsible, and yet leave the jury free to judge, as they are bound to do, upon the weight and effect of the evidence. It is not the duty of the judge, — it has sometimes been denied that he has the right, — to state his opinion upon conflicting evidence, whether it is or is not sufficient to establish certain facts, but only to state how each fact, if proved, would apply in its effect on the right in issue.

But we are further of opinion, that, as applied to the subject matter, and the evidence in the case, the instruction prayed for could not be given. The object was to prove a title to the flats by disseizin; it being admitted that the legal title was in the demandant. It was admitted in the tenant's argument, that there must be a seizin and possession proved, on the part of the tenant, and that mere claiming was not enough; and, also, that the possession must be exclusive, for, if mixed, the seizin is according to the title. It may be proper to add another familiar proposition, though not expressly conceded in the argument, that, where there is no actual and exclusive possession in either, the constructive possession follows the title, and is in the true owner.

The first clause, in the prayer for instructions, is this:

"That if the jury are satisfied, on the whole evidence, that the tenant and those under whom he claims entered upon and took and held visible and exclusive possession of part of the demanded premises, and exercised acts of open and exclusive ownership therein, and, as to the residue of the premises, used and enjoyed the same, by passing over them with vessels to and from his wharf, with intent thereby to possess and hold the whole premises on a claim of right, and by regular paper title up to the present line," &c. The sentence is not carried out, but as the prayer afterwards speaks of such "entry and possession," the request was in effect to instruct the jury, that such entry on a part, with

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a claim to the whole, was an entry upon and possession of the whole.

The proper business of jurisprudence is to apply rules of law, which are necessarily expressed in general terms, to the circumstances of each case, with such modification and adaptation, as the particular case requires. It is under this consideration, that the pertinency and correctness of the instruction asked for are to be examined.

When this proposed instruction speaks of the whole and of part of the premises, there is nothing to indicate, that the premises were not all of one kind and quality of estate. But when applied to the subject matter, wharf and flats, and substituting the specific terms of the actual case, in place of the general terms of the proposed one, the instruction in question, we think, would stand thus: If the jury are satisfied, on the whole evidence, that the tenant, &c., entered upon, and took and held visible and exclusive possession of the wharf, and exercised acts of open and exclusive ownership in that wharf, and, as to the flats, between the wharf and low water line, used and enjoyed the same, by passing over them with vessels, when covered with tide water, to and from his wharf, with intent thereby to possess and hold the flats as well as the wharf, on a claim of right, and by regular paper title up to the present line, it would be an entry upon and possession of the flats.

This, we think, would not have been a tenable, legal proposition. Sailing over the flats, which every one had a legal right to do, would not have been a *pedis possessio*, an entry, or the first step towards getting possession. Every disseizin is a trespass, although every trespass is not a disseizin. When, therefore, the tenant's predecessor first passed over these flats, with a boat, he had a perfect right to do so, under the common right of way for vessels. Without such right, it was a trespass and a wrong. Now it is perfectly well settled, that when an act may be either rightful or wrongful, it is not for the actor to say, that it was done with a wrongful intent, and to claim rights under it; his act shall be attributed to his right.

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However long such a use is continued, it can confer no possession; and whatever may be the intent of the party, or whatever his declarations, it cannot render that an entry and an act of possession, which is only the use and enjoyment of a common right of way. But, could such a use of the flats, by sailing over them, be regarded, in any view, as a possession, it is neither adverse nor exclusive. No action would lie against the party thus sailing over the flats, and no power would exist, on the part of the owner, to prevent his entry, or to remove him therefrom. These are the tests, to show that such act of sailing would not amount to a technical breach of the owner's close. It is impossible to deny, that the owner has an equal right with the rest of the community to pass over these flats; if the tenant therefore could have any possession, it would be but a mixed possession, in which case, the legal and constructive possession follows the title.

These considerations apply exclusively to the flats; the wharf stands on different grounds, and, in regard to that, the instruction is not objected to. Then, if there were no entry and no possession of the flats, all the other acts stated amount to a mere parol claim, not qualifying any act done. And, if we are right thus far, it seems hardly necessary to pursue this prayer for instructions further. If there were no entry and possession, or if there were no adverse and exclusive possession, there could be no notice to the demandant of such adverse possession, and the claim must have been a mere parol claim. So, if by conveyances and other equivalent acts, the demandant, or those, &c., recognized and yielded to such claim and possession. If, by the use of the term "conveyances," were intended any deed affecting the title of the demandant by way of grant, release, or estoppel, this would be a question of documentary title, and not a question of disseizin. We understand, therefore, by this expression, conveyances between the demandant or his predecessors, and third persons, containing express or implied admissions. This would amount to nothing more than parol admissions insufficient to affect title. Any other case of recognition of, and

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yielding to, the tenant's claim and possession, could not be shown, until such adverse possession had been established.

As to yielding or resigning by the demandant, if it were a mere claim in words, without act done on the part of the tenant, and an admission of that claim, in words, on the part of the demandant, it would be no bar or estoppel; it would be a parol release, inoperative without deed. Such yielding and submission, to be of any legal effect, must be to some act of entry and possession. Acquiescence, even in an open and visible act of entry or possession done by another, does not render such entry or possession adverse, unless the party, whose acquiescence is claimed, could have resisted it, or maintained an action upon it. *Gray* v. *Bartlett*, 20 Pick. 186.

Perhaps this case, of an estate consisting partly of flats built upon and enclosed, of which the owner may have open, adverse, and exclusive possession, as in other cases of solid land, and partly of open flats, upon which, until built upon and enclosed, all persons have a right of passage, with vessels, may be illustrated by a familiar case. By the law of Massachusetts, the laying of a highway over land does not divest the title of the owner; he is then seized in fee of the land, subject to the easement. Suppose the case of a highway laid over a farm. A person, not in possession, and not establishing a title by deed, has claims upon the whole farm against the owner; and, for the purpose of asserting such claim, he passes over such highway, declaring to the owner and to all other persons, that it is his intent and purpose to consider this act as an entry and adverse possession, as against the owner. The soil under the way is part of the premises; he therefore enters upon a part of the premises, with intent to take possession of the whole, and with full and express notice of such intent to the owner, and uses the way constantly with a like intent thirty years. Inasmuch as the owner could not prohibit him from such entry upon and use of the way, or sue him for it, his acquiescence would impair none of his rights; such use of the way would not be an exclusive, or an

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adverse, or an actual possession of the residue of the farm. The cases are analogous.

These difficulties, in regard to the title to flats, under the colony ordinance, are not now disclosed for the first time; they are intrinsic and unavoidable. In most other cases of controverted claims to real estate, defective titles may be strengthened, inchoate ones perfected and made certain, by actual possession, more or less exclusive, — by constructive possession, under deeds recorded or otherwise, — by presumptions of grant, — and by other ways, by means of which time becomes the great quieter of titles. But, in regard to flats, it is far otherwise. Most of the tracts of flats, within the commonwealth, are without value; a large portion of the residue of very little value; a small portion only, from the progress of commerce, has come to be of great value; but the same rules must apply to all. The first great difficulty is in ascertaining, in each particular case, the direction of the lines, to which the riparian proprietor is entitled, as between him and his conterminous proprietor. *Valentine* v. *Piper*, 22 Pick. 95. The rule is simple, but it is rendered complicated and difficult of application, by the infinitely diversified forms which the sea-shore may present. Add to this, that, by the same law, which vests the fee in the riparian proprietor, a general right of way is reserved to the public, until built upon, or actually enclosed, so as to exclude navigation, and it is obvious, that the ordinary presumptions and conclusions of law, arising from possession and use, can have no application, in regard to open and unenclosed flats. The constant use of such flats, by one not entitled to claim and hold them as the riparian proprietor, for the ordinary purposes of navigation, can give no exclusive or adverse possession; and such has been the law from the first settlement of the country to the present time.

Judgment on the verdict for the demandant.

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James A. Thompson vs. Josiah Bright.

The commonwealth, by a deed dated November 23d, 1801, granted a township of land in Maine to J. P., upon the condition, that the grantee, "before the first of January, 1802, shall have settled thirty families within said township": This condition was not then or ever afterwards performed according to its terms; but the legislature, by resolves of 1816, *c.* 116, and 1831, *c.* 40, extended the time for its performance to the 1st of June, 1836, and, by a resolve of 1836, *c.* 43, authorised a commutation therefor, at the rate of thirty dollars for each family, which might then be deficient; declaring, at the same time, that all lands, on which the commutation money should not be paid, at that time, should be forfeited, and providing, also, that grantees might then have the further time of one year for such payment, by giving bonds therefor satisfactory to the land agent: On the 1st of June, 1836, R. S. R. and J. B. being the owners severally of certain undivided portions of the township, by mesne conveyances from J. P., gave their bond to the land agent for $900, being the amount of the commutation money due thereon, payable in one year: In January, 1840, R. S. R. died, intestate, leaving sufficient estate for the payment of all his debts, including the bond to the commonwealth, and J. L. R., his son, was appointed administrator of his estate: On the 5th of June, 1843, the defendant, claiming title by mesne conveyances from J. P., conveyed one undivided fourth part of the township to C. B., by a deed containing the usual covenants, and also a covenant against all claims and demands of the commonwealth, on account of the condition in the original deed to J. P., and "to extinguish and cause to be discharged all claims on the granted premises, on account of the settling duties commonly so called": In January, 1845, J. B. died, leaving sufficient estate for the payment of all his debts, including the said bond to the commonwealth: On the 14th of March, 1845, the legislature, by a resolve of that date, directed the land agent, (first giving the notices therein specified) to take measures for the recovery of possession of all lands granted on the condition above mentioned, where the same had not been complied with; declaring, that a compliance with the provisions of the resolve of 1836, *c.* 43, should be deemed to be a full performance of the said condition, and that the title to lands, in reference to which the same had been so performed, should be complete in the grantees and their assigns: On the 6th of January, 1846, C. B., the defendant's grantee, conveyed the premises, by a deed of quitclaim, to the plaintiff, who entered and took possession under the same: On the 27th of January, 1846, J. L. R., the administrator of R. S. R., paid B. & R.'s bond to the commonwealth for the commutation money, with interest, amounting to $1445; and, on the 3d of March following, the land agent, in pursuance of a resolve of the legislature, released to him all the right and title of the commonwealth in the township: In October, 1844, B. and the defendant conveyed all their remaining interest in the township to certain grantees, who thereupon entered upon the premises, and were in the actual occupation thereof, at the time of the commonwealth's deed to J. L. R.: Immediately on receiving his deed from the commonwealth, J. L. R. went upon the land and notified the parties in possession, namely, the plaintiff and the grantees above mentioned of B. and the defendant, of his claim thereto, and of his purpose to maintain the same at law, if necessary: A negotiation thereupon ensued, between J. L. R. and the parties in possession (with the exception of the plaintiff), which resulted in a conveyance from the former, June 11th, 1846, to the grantees of B. and the defendant and to one other person, of all his interest in the township; from which time, the usual acts of

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ownership were exercised by the said grantees, and not by the plaintiff: In an action of covenant by the plaintiff against the defendant, on the covenants contained in the deed of the latter to C. B., it was held:

1. That the effect of the resolve of 1816, *c.* 116, (the provisions of which were further extended by the resolve of 1831, *c.* 40,) was to confirm the original deed to P., — to waive the performance of the condition precedent contained therein, and to substitute therefor a condition subsequent, — and to vest the estate in P. and his assignees subject to such new condition.
2. That, by the resolve of 1836, *c.* 43, lands held upon the said condition were discharged from a liability to forfeiture for non-performance of the same, by the payment of the commutation money on or before June 1st, 1836, or by giving a satisfactory bond for such payment, within a year from that time.
3. That the giving of such bond by B. & R., although the same was not paid, according to its terms, vested an absolute title to the township in P. or his assignees.
4. That, by the conveyance of the township from the commonwealth to J. L. R., on his payment of the amount due on the bond, no estate passed to him.
5. That if the non-payment of the bond were a breach of the condition in the original deed to P., so as to entitle the commonwealth to recover possession for condition broken, the commonwealth could make no valid conveyance of the estate, without first recovering possession.

THIS was an action of covenant, submitted to the court upon an agreed statement, from which the following facts appeared.

The commonwealth, by a deed bearing date November 23d, 1801, conveyed a township of land, containing about twenty-two thousand acres, in the then district of Maine, to John Peck, upon the condition, that the grantee, "before the 1st of January, 1802, shall have settled thirty families within said township." At the time this deed was executed, no families had been or were settled on the township thereby conveyed.

The legislature, by a resolve of 1816, *c.* 116, extended the time for the performance of the condition to June, 1822, and by a second resolve of 1831, *c.* 40, further extended the time therefor to the 1st of June, 1836. By a third resolve, passed April 1st, 1836, (1836, *c.* 43), the legislature authorized a commutation, at the rate of thirty dollars for each family, which might be deficient on the 1st of June, 1836. The resolve also declared, that all lands held on the condition of settlement, on which the commutation money should not be paid at that time, should be forfeited; provided that such

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proprietors might have the further time of one year, from and after June 1st, 1836, for such payment, by giving bonds therefor satisfactory to the land agent.

On the 1st of June, 1836, no families had been settled on the township conveyed to Peck, nor had the commutation money been paid; but, on that day, Richard S. Roberts, being the owner of seventeen lots, or about eighteen hundred acres, and James Barnard, being the owner of one undivided half part of the residue of the township, and both deriving title by sundry mesne conveyances from Peck, gave their sealed note or bond to the land agent, for the payment to the commonwealth, in one year, of the sum of nine hundred dollars, being the amount of the commutation money then due on account of the township of which they were part owners.

On the 27th of February, 1837, Barnard and Roberts, not having paid their bond, petitioned the legislature for further time to pay the same; but no action was had on their petition.

On the 10th of January, 1838, John W. Dana presented a petition to the legislature, setting forth that he had conveyed his title in the township in question, with warranty, and that he was contingently liable thereon, by reason of the commutation money still remaining unpaid, and praying for an allowance of further time for the payment thereof. A resolve was thereupon passed, 1838, *c.* 48, giving Dana further time until the 22d of February, 1839, for the payment of the commutation money, and providing that no forfeiture should accrue by reason of the non-payment thereof before that day, and that on payment by Dana, the obligation of Barnard and Roberts should be assigned to him for his own use. No payment was ever made by Dana.

In January, 1840, Richard S. Roberts died, intestate, leaving several children and heirs, one of whom, his son, John L. Roberts, was appointed administrator of his estate. In the inventory of the estate, no mention was made of any interest in this township. Richard S. Roberts left sufficient

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estate, after payment of his debts, to pay the bond of himself and Barnard to the commonwealth.

On the 5th of June, 1843, Josiah Bright, the defendant, claiming title by mesne conveyances from Peck, made a conveyance to Charles Bemis, in fee, of one undivided fourth part of the township. In this deed, the defendant entered into the usual covenants of seizin, title, and warranty, (with certain exceptions), and also covenanted with Bemis and his assigns, against all claims and demands of the commonwealth of Massachusetts, on account of the condition in the original deed of the commonwealth to Peck, and "to extinguish and cause to be discharged all claims on the granted premises, on account of the settling duties, commonly so called."

James Barnard died in January, 1845, leaving sufficient estate, after payment of his debts, to pay the bond above mentioned to the commonwealth.

The legislature, by a resolve passed March 14th, 1845, (*c.* 81 of that year), directed the land agent to take measures to recover possession, for the commonwealth, of lands previously conveyed on condition that the grantees should place thereon within a certain time a specified number of settlers, in those cases where the condition had not been complied with. The resolve also provided, that a compliance with the provisions of the resolve of 1836, *c.* 43, should be deemed and taken to be a full and satisfactory performance of the condition referred to; and declared the title to lands, in reference to which the condition had been so complied with, to be complete in the grantees or their assigns. The resolve further provided, that, before proceeding, the land agent should first give notice, as therein prescribed, to delinquent proprietors, of the passing of the resolve, and that delinquent proprietors should be allowed until the 1st of December, 1845, to give the land agent the evidence necessary to prove their title complete. The notice required by this resolve was given by the land agent.

On the 6th of January, 1846, Charles Bemis, the defendant's grantee, conveyed the same premises conveyed to him

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by the defendant, to James A. Thompson, the plaintiff, by a deed of quitclaim; and the plaintiff entered and took possession under the same, and caused his deed to be recorded, January 20th, 1846.

On the 27th of January, 1846, John L. Roberts, the administrator of Richard S. Roberts, paid Barnard and Roberts's bond to the commonwealth, with interest, amounting to $1445; and by a resolve of February following, (1846, c. 32,) the legislature directed the land agent to release all the right and title of the commonwealth in the township in question to him; which was accordingly done by a deed dated March 3d, 1846.

In October, 1844, Nahum Perkins, Jabez Perkins and David Scribner purchased of Barnard and the defendant, by a deed duly executed and recorded, all their remaining estate in the township, being three undivided fourth parts thereof, (except the lots heretofore mentioned as belonging to Richard S. Roberts), namely, of Barnard two undivided fourth parts, and of the defendant one undivided fourth part. The grantees, immediately after making the purchase, entered upon the premises, and were in the actual occupation thereof at the time of the commonwealth's deed to John L. Roberts, as was the plaintiff, also, under his deed from Bemis of the remaining undivided fourth part.

Peck, the original purchaser of the township from the commonwealth, and his grantees, ever since the conveyance to him, had been and then were in the actual possession of the same; and no steps had ever been taken by the commonwealth to recover possession, nor had the land ever been declared to be forfeited, except as herein before stated.

John L. Roberts, immediately upon receiving his deed of March 3d, 1846, from the commonwealth, proceeded to the county of Franklin, in the state of Maine, in which the township was situate, caused his deed to be there recorded on the 19th of the same month, and, by the advice of counsel, went upon the land, where one of the Perkinses, with a gang of men, was just closing lumbering operations for

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the season, notified him of his claim to the township, and demanded and obtained of him the marks of the timber cut on the same, for the purpose of identifying and seizing it on its way down the river. The timber was afterwards seized and held for and on account of Roberts, and was subsequently demanded and obtained on account of timber cut on the township during the same and the preceding season. Roberts also notified the Perkinses, Scribner, and the plaintiff, then being in possession of the township, of his claim thereto under his deed from the commonwealth, and of his purpose to maintain it at law, if necessary.

A negotiation thereupon took place between Roberts, the Perkinses, and Scribner, which resulted in a conveyance from Roberts to them and one Stanley, by a release and quitclaim, dated June 11th, 1846, to the Perkinses and Scribner, in the proportions which they had heretofore held, and to Stanley the proportion which the plaintiff had held. The consideration, being $2600, was received of the grantees by Roberts. This settlement and conveyance took place at Augusta, in Maine, where the plaintiff resided; but, though notified, he took no part therein. The usual acts of ownership have since been exercised by the above named grantees, and not by the plaintiff.

If, in the opinion of the court, the plaintiff is entitled to recover on the covenants in the defendant's deed to Bemis the damages therefor are to be hereafter assessed or agreed.

R. H. Dana, Jr., for the plaintiff.

E. Buttrick, for the defendant.

The opinion of the court was delivered at March term, 1849.

Wilde, J. This is an action of covenant broken, on the covenants contained in a deed from the defendant to one Charles Bemis, of an undivided fourth part of a township of land, previously conveyed by the commonwealth to one John Peck, from whom the defendant derived his title.

By his deed to Bemis, the defendant covenanted with him, his heirs and assigns, that he would warrant and defend the

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granted premises against all claims and demands of the commonwealth, on account of the condition in the deed to Peck; and to extinguish and cause to be discharged all claims on the premises, on account of the settling duties commonly so called.

The premises were afterwards conveyed by Bemis to the plaintiff, and the question is, whether, upon the facts agreed, the plaintiff is entitled to recover for the breach of either of the covenants in the defendant's deed to Bemis.

The plaintiff contends that the deed to Peck was on a condition precedent, namely, that, before the grant to him, he should have settled thirty families within the township. It is admitted, that no families were settled within the township, at or before the grant to Peck, and it is therefore argued, that no estate ever vested in him by that grant.

It is generally true, that, by a grant of land, on a condition precedent, no estate will vest in the grantee, before the performance of the condition. But Littleton lays down an exception to the general rule, as follows: "If land be granted to a man for the term of five years, upon condition, that if he pay to the grantor, within the first two years, forty marks, that then he shall have a fee, or otherwise but for the term of five years, and livery of seizin is made to him by force of the grant, now he hath a fee simple conditional." Sect. 350.

Whether the entry of Peck under the grant, and holding possession with the consent of the commonwealth, by himself and those holding under him, is equivalent to livery of seizin, so as to bring the grant to him within the above or any other exception to the general rule, it is not necessary to consider; for, from the facts stated, it clearly appears, that the performance of the condition by Peck has been waived by the commonwealth, and a condition subsequent has been substituted therefor.

The resolve of 1816, c. 116, extended the time for the performance of the conditions, as to settlers, contained in the grants of the commonwealth, where the same had not been performed, for the term of five years, ending the 1st of June,

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1822. By this resolve, the commonwealth waived the condition in their deed to Peck, and, thereupon, if not before, the estate vested in Peck subject to the new condition. The resolve operated as a confirmation of the original grant, substituting only a subsequent condition for a condition precedent.

This new condition, however, was not performed; and it has been argued by the defendant's counsel, that the right of the commonwealth, to recover possession of the premises for the breach of the condition, has been barred by the Rev. Sts. c. 119, § 12, as the commonwealth did not enter, or commence any action to recover possession, for more than twenty years after the breach of the condition. This might be so, but for subsequent resolves, whereby the time for the performance of the condition was still further enlarged; such enlargement being undoubtedly a waiver of the right of the commonwealth to enter or to recover possession for the breach of the former condition. By the resolve of 1831, c. 40, the time for the performance was enlarged for the term of six years ending June, 1836; and before that term expired, another resolve passed, which appears to the court decisive of this case. By the last mentioned resolve, (1836, c. 43,) the land agent of the commonwealth was directed to give notice to all proprietors, who were not known to have fulfilled the conditions as to settlers, to transmit to him, on or before the first day of June then next, a list of the number of settlers they had respectively placed on their lands, if any, and pay the sum of thirty dollars to the agent, for each and every family which should then be deficient of the whole number, which they were severally required by their deeds from the commonwealth to place thereon, or their lands would be declared forfeited to the commonwealth: "Provided, however, that they may have the further time of one year for the payment of the commutation, by giving bonds satisfactory to the land agent." We entertain no doubt of the meaning of this proviso. It was to place those who should pay the commutation money, and those who should

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give satisfactory security therefor, on the same footing; and, in either case, their lands were not to be forfeited And so it is declared in the resolve of 1844, *c.* 81, which refers to the resolve of 1836, *c.* 43, and provides, that compliance with that resolve should be deemed and taken to be a satisfactory performance of the conditions contained in such conveyances; and further declares the title of such as had so complied to be complete in themselves or in their assignees. And this is the obvious meaning of the resolve of 1836, *c.* 43, which makes no distinction between the payment, and the giving satisfactory security for the payment, of the commutation money. If it were not the intention of the resolve to discharge the lands from the liability to forfeiture, by compliance with the proviso, there would be no reason for requiring security.

This being the meaning of the resolve, we are of opinion that it is decisive of the present action; for it is agreed, that James Barnard and Richard S. Roberts, the assignees of Peck, did give their sealed note or bond, obligating themselves to pay to the commonwealth, in one year, the sum of $900, being the amount of the commutation money then due on account of the township, which bond was satisfactory to the land agent. This security was given in compliance with the proviso in the resolve, and vested an absolute title in the assignees of Peck, although the commutation money was not paid within the year, so that no legal estate passed by the deed from the commonwealth to John L. Roberts.

Another ground of defence, we also think, is well founded. It is objected, that if the non-payment of the commutation money within the year were a breach of the condition, so as to entitle the commonwealth to recover possession for condition broken, the commonwealth had no power to assign such right, without first recovering possession. The question is not whether the commonwealth can be disseized, so as to invalidate a sale of their lands, as in the cases of individual proprietors of lands, but whether the commonwealth can assign a chose in action.

In the case of *Wilbur* v. *Tobey*, 16 Pick. 175, it was

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decided, that the commonwealth is not so seized of an escheat before an inquest of office, as to be enabled to grant the same to another, and that nothing passes by such a grant. In that case, the estate escheated to the commonwealth by the death of the tenant without heirs. It was held, that the statute of 18 Henry VI., *c.* 6, was in force in this commonwealth. That statute provides, that all letters patent or grants of lands and tenements, before office found or returned into the exchequer, shall be void. The construction of this statute was very fully considered in *Doe* v. *Redfern*, 12 East, 96. That was the case of a grant of lands by the king, which had escheated by the death of the tenant without heirs, and it was held, that the grant was void, although made after inquest found, there being a defect in the inquisition. It was admitted by the counsel for the grantee, that if that had been a case of forfeiture, or entry for condition broken, the grant before office found would be void. But it was contended, though not admitted by the court, that the case of an escheat was very different from that of a forfeiture; as in the case of escheat, the king is in possession immediately on the death of the tenant without heirs. It was answered, and so it was decided by the court, that, although the king might be considered as having a possession in law, before office, yet he cannot grant until office found and returned, by the 18th of Henry VI., *c.* 6. Blackstone, in his commentaries (3 Bl. Comm. 259), says, that "inquests of office were devised by law, as an authentic means to give the king his right by solemn matter of record, without which, in general, he can neither take, nor part from, any thing. For it is a part of the liberties of England, and greatly for the safety of the subjects, that the king may not enter upon, or seize any man's possessions, upon bare surmises, without the intervention of a jury." And, "with regard to real property, if an office be found for the king, it puts him in immediate possession, without the trouble of a formal entry, provided a subject, in the like case, would have had a right to enter."

In *Jackson* v. *Smith*, 7 Wend. 367, it was decided, that if

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an estate escheat by the death of the tenant without heirs, yet, until office found, the state has no right to enter and take possession; and a grant of the lands before office found conveys no title. And the case of *Fairfax's Devisee* v. *Hunter*, 7 Cranch, 603, was decided on the same principle. And the principle unquestionably applies to all cases of forfeiture, except as to the forfeiture of the lands of persons attainted of high treason, which, some of the judges were of opinion, vested the actual possession in the king, without office, on the ground, that the 33d of Henry VIII., *c.* 20, had taken such cases out of the 18th of Henry VI., *c.* 6. Dyer, 145. Upon these principles and authorities, we are of opinion, as to both grounds of defence, that this action cannot be maintained.

NICHOLAS H. BRIGHAM *vs.* FREDERICK A. HENDERSON.

Where a contract is entered into in this state, and to be performed here, between parties who are then citizens thereof; and the creditor subsequently removes to and becomes a citizen of another state, in pursuance of an intention to do so formed before the making of the contract; such removal and residence will not prevent the debtor's certificate of discharge, under the insolvent laws, from being a bar to an action on the contract in the courts of this state.

THIS was an action by the payee, against the acceptor, of a draft for $399·84, drawn and dated September 1st, 1845, at Dedham, in this state, on the defendant, at Boston, and payable to the plaintiff or his order in six months after date, at any of the banks in Boston. The action was commenced on the 16th of March, 1846. The trial was before *Colby*, J., in the court of common pleas.

The defendant rested his defence upon a discharge under the insolvent laws of this state, by a certificate thereof in the usual form, bearing date November 23d, 1846.

It was admitted, that the first publication of notice of the proceedings in insolvency was on the 17th of April, 1846; that, at the date of the acceptance, the plaintiff was in this

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state, where he had always lived and done business; but that he had then determined, and was making preparations, to remove to New Orleans; and that he left this state accordingly, in October, 1845, and became and was a citizen of New Orleans, when the present action was commenced.

It was also admitted, that the consideration of the acceptance was a sale of goods in this state; that the plaintiff, at the time of the sale, had a place of business here; and that the defendant, at the date of the acceptance, was, and had ever since continued to be, a citizen of Massachusetts.

The presiding judge instructed the jury, *pro forma*, that, upon the facts admitted, the defendant's certificate of discharge was no bar to the action; and the jury returned a verdict for the plaintiff. The defendant thereupon excepted.

W. Brigham, for the plaintiff.

B. F. Brooks, for the defendant.

The opinion of the court was delivered at March term, 1849.

Metcalf, J. The question in this case arises on that clause in the seventh section of the insolvent act, (*St.* 1838, *c.* 163,) which provides that a certificate shall absolutely and wholly discharge a debtor from all debts that "are provable under this act, and which are founded on any contract made by him after this act shall go into operation, if made within this commonwealth, *or* to be performed within the same."

The contract, on which this action is brought, was provable under the insolvent act; was made after that act went into operation; was made within this commonwealth, *and* was, by its terms, to be performed within the same; and both parties were citizens of the commonwealth, when the contract was made.

The only grounds, on which the plaintiff attempts to avoid the discharge in this case, are his removal to the state of Louisiana, after the contract was made, in pursuance of an intention formed by him before it was made, and his residence in that state until the time of bringing the action. And he relies upon the decisions of the supreme court of the United

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States, establishing the doctrine, that a state insolvent law cannot, consistently with the constitution of the United States, affect contracts made between a citizen of that state and a citizen of another state. The history of this judicial doctrine is somewhat remarkable; but it is now too familiar to need to be here repeated. See *Ogden* v. *Saunders*, 12 Wheat. 213; *Boyle* v. *Zacharie*, 6 Pet. 348, 635; *Woodhull* v. *Wagner*, 1 Bald. 296; *Towne* v. *Smith*, 1 Woodb. & Minot, 115; *Van Hook* v. *Whitlock*, 26 Wend. 43; 2 Kent's Com. (6th ed.) 392, 393.

So far as the decisions of the supreme court of the United States clearly extend, on this point, this court regard them as of paramount authority. Accordingly, it was decided in *Savoye* v. *Marsh*, 10 Met. 594, and *Fiske* v. *Foster*, 10 Met. 597, and in *Woodbridge* v. *Allen*, 12 Met. 470, that contracts, made between citizens of this state and citizens of another state, were not affected by a discharge of the debtor under our *St.* of 1838, *c.* 163. In these cases, the parties were citizens of different states at the time when the contracts were made, and at the time when the actions were brought. And such also was the fact in those cases, in the supreme court of the United States, in which the decisions were made, on which the present plaintiff relies, and which were followed by this court, not because the reasoning, on which they were founded, was satisfactory, but because they were authoritative precedents. On all questions which involve the construction of the constitution of the United States, the supreme court of the United States is the only rightful ultimate tribunal; and its decisions on those questions cannot be withstood or disregarded by state courts, without a dereliction of duty and a violation of the cardinal principles of the federal government. But that court has not decided that a contract, made between citizens of the same state, cannot be affected by its insolvent laws, if one of the parties afterwards becomes a citizen of another state. And in the last case on this subject, which has come before that court, (*Cook* v. *Moffat*, 5 Howard, 295,) the counsel for the creditor denied the validity of the debtor's discharge

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from the obligation of his contract, in these words: "It is a contract *between citizens of different states at the time when made;* and this is the fact and the principle which exclude it from the operation and effect of a release of the debtor under the insolvent laws of his state."

Mr. Justice Story, in his commentaries on the constitution of the United States, (vol. iii. § 1384,) says that the result of the decisions, on the subject of prospective state insolvent laws, is as follows: "1. That they apply to all contracts, made within the state, between citizens of the state. 2. That they do not apply to contracts, made within the state, between a citizen of a state and a citizen of another state. 3. That they do not apply to contracts not made within the state. In all these cases," (that is, of the second and third classes,) "it is considered that the state does not possess a jurisdiction, coëxtensive with the contract, over the parties; and therefore that the constitution of the United States protects them from prospective as well as retrospective legislation."

Mr. Justice Johnson, in concluding his opinion in the case of *Ogden* v. *Saunders*, 12 Wheat. 369, states these three propositions: "1. That the power given to the United States, to pass bankrupt laws, is not exclusive. 2. That the fair and ordinary exercise of that power by the states does not necessarily involve a violation of the obligation of contracts, *multo fortiori* of posterior contracts. 3. But when, in the exercise of that power, the states pass beyond their own limits, and the rights of their own citizens, and act upon the rights of the citizens of other states, there arises a conflict of sovereign power, and a collision with the judicial powers granted to the United States, which renders the exercise of such a power incompatible with the rights of other states, and with the constitution of the United States."

These passages show the grounds on which the supreme court of the United States have decided that contracts between citizens of different states cannot be affected by state insolvent laws. As has been already stated, our judgments

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are not convinced by the reasons given for those decisions. We concur with chief justice Taney, (5 Howard, 310,) who says, "To the first two propositions maintained in the opinion of judge Johnson, I entirely assent. But when the two clauses in the constitution, therein referred to, are held to be no restriction, express or implied, upon the power of the states to pass bankrupt laws, I cannot see how such laws can be regarded as a violation of the constitution of the United States upon the grounds stated in the third proposition." Yet we deem ourselves bound, for the reason before given, to conform our decisions, on matters relating to the federal constitution, to the decisions of the court established by that constitution. That court has never decided the question now brought before us, nor made any decision inconsistent with the defence on which the defendant relies. As the plaintiff was a citizen of this commonwealth, when the contract in question was made with him, and has resorted to the courts of the commonwealth to enforce that contract, we do not perceive that, by giving effect to the defendant's discharge, we come in "collision with the judicial powers granted to the United States."

The plaintiff's intention, formed before the contract was made, to remove to Louisiana, cannot have any effect on the case. And if his removal from Boston to New Orleans would enable him to avoid the defendant's discharge, so would the removal of a creditor across the line of the state (however small the distance) enable him to do the same; thus making the operation of the insolvent law upon contracts made between debtor and creditor, citizens of the commonwealth, to depend upon the will of the creditor. In the language of the late Mr. Justice Hubbard, with reference to another subject, (4 Met. 404,) "it will be time enough to yield in this matter of state jurisdiction, when the question of right has been determined by the highest tribunal."

Verdict set aside.

Note. In the case of *Abraham J. Converse* v. *James B*

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Bradley, Middlesex, October term, 1848, decided at the March term, in Suffolk, 1849, it appeared, that the defendant made a promissory note, dated at Lowell, January 30th, 1847, in favor of the plaintiff, both parties then being citizens of this commonwealth; that, on the 1st of February following, the plaintiff removed out of the commonwealth; that, on the 6th of the same February, the defendant applied for the benefit of the insolvent law; and that such proceedings subsequently took place on the application, that the defendant received a certificate of discharge from his debts as an insolvent debtor. On these facts, judgment was given for the defendant.

D. S. Richardson & W. A. Richardson, for the plaintiff

J. G. Abbott & S. A. Brown, for the defendant.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

FOR THE

COUNTY OF BERKSHIRE, SEPTEMBER TERM 1848, AT LENOX.

PRESENT:

Hon. LEMUEL SHAW, Chief Justice.
Hon. SAMUEL S. WILDE,
Hon. CHARLES A. DEWEY,
Hon. CHARLES E. FORBES,
Hon. THERON METCALF,
} Justices.

Seth King & others *vs.* Ralph Little & others.

Ancient books, purporting to be the records of the Lower Housatonic Proprietary, produced by the clerk, were held admissible as evidence, without proof of the original and continued organization of the proprietary.

Office copies of registered deeds, purporting to have been executed in 1736 and 1742, are admissible in evidence, without other proof.

M. K., in 1736, by a deed, which was absolute upon its face, conveyed an estate to P. L.; who, in 1742, conveyed the same estate to R. K., by a deed, in which it was recited, that R. K. had purchased M. K.'s right of redemption therein: it was held, that this recital was no ground for presuming that the first deed was a mortgage.

B. K. devised to the lawful heirs of his son H. K. all the lands and real estate, situated in the county of Berkshire, which descended to him as the heir at law of his father B. K.: One of the heirs dying and her share descending to her father H. K., he made a conveyance to S. K. in the following terms, namely, "all right, title, and interest, that I have or ought to have to a tract or parcel of land

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situated in Great Barrington, *being the same that was bequeathed by my father B. K., deceased, to my children:*" It was held that these terms were not sufficient to pass an estate in Sheffield, although B. K. possessed an estate there, which was included in the devise to the children of the grantor.

THIS was an action of trespass, for breaking and entering the plaintiffs' close, in Sheffield, and cutting wood and timber thereon. The defendants pleaded the general issue, and filed a specification of defence, claiming title in themselves to the lands described in the writ.

The plaintiffs claimed the lands in question, under a location or assignment thereof, on the 8th of June, 1832, by the Lower Housatonic Proprietary, to Elizabeth King, Frederick King, Harriet King, and Jane King, grandchildren and devisees of Bohan King, on the original right of one Moses King.

At the trial, which took place in this court, before *Dewey*, J., at the last May term, the plaintiffs first proved the alleged acts of trespass, and, then, in order to establish the right of Moses King, and the transmission of it to them, introduced evidence, from which the following facts appeared.

John Granger, one of the original proprietors of the town of Sheffield, conveyed his whole interest in lands therein to Moses King, his heirs and assigns, by a deed dated July 27th, 1733, duly acknowledged and recorded, in which the estate conveyed is described as the sixty-second part of the township, a part of which was already located, "together with all after divisions that can or may arise on the same grant."

Moses King, by his deed dated June 29th, 1736, which was duly acknowledged and recorded September 3d, 1736, conveyed certain parcels of land particularly described, "together with the right of the said Moses King in the township of Sheffield, being four hundred and six acres of land," to Philip Livingston, his heirs and assigns.

Philip Livingston, by his deed dated March 5th, 1742–3, duly acknowledged and recorded, reciting the conveyance to him, as above mentioned, by Moses King, and the receipt of a certain sum of money paid by Reuben King, "who hath

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purchased said Moses King's right of redemption in said lands and premises," conveyed the same premises and right to Reuben King, his heirs and assigns.

From Reuben King, the estate descended to his son Bohan King, by whom it was devised to his grandchildren, in the following terms: "I give and devise to the lawful heirs of my son Henry King, all the lands and real estate, situated in the county of Berkshire, in this state, or elsewhere, that have descended to me, as heir at law to the estate of my father Reuben King, formerly of Great Barrington, in the county of Berkshire, deceased. And I also give and devise to the lawful heirs of my said son Henry, all such lands and real estate, as I purchased of my nephew and niece, Ephraim and Sally Wells, of Greenfield, in the county of Franklin, being lands inherited by them from their grandfather Reuben King, and situated in the county of Berkshire aforesaid."

At the time of the decease of Bohan King, in the spring of 1823, the lawful heirs of the testator's son Henry King, were the four children of the latter already named, Elizabeth, Frederick, Harriet and Jane. Elizabeth married Sherman Day, one of the plaintiffs. Harriet died in 1833, or 1834, unmarried and without issue. Her share of the estate descended to her father Henry King, as her heir at law, by whom a deed was made thereof to Seth King, one of the plaintiffs. By this deed, the grantor remised, released, and forever quitclaimed to the grantee, his heirs and assigns, in the following terms: "all right, title, and interest, that I have or ought to have to a tract or parcel of land, situated in Great Barrington, in the county of Berkshire, being the same that was bequeathed by my father Bohan King, to my children."

It appeared from the records of the Lower Housatonic Proprietary, that the lands described in the writ were located as above mentioned upon the right of Moses King; that Moses King was one of the original proprietors, with the right of four hundred and sixty-six acres, to which were afterwards added one hundred acres more; that, previous to the location in June, 1832, to the devisees of Bohan King, loca-

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tions had been made to various persons on the right of Moses King, which were more than sufficient to exhaust the whole five hundred and sixty-six acres; but that, excluding from this computation all the locations made since the deed to Livingston (June 9th, 1736), except such as were laid to Bohan King and his devisees (there were no locations to Livingston or to Reuben King), there would be more than enough left of the right of Moses King, to warrant the location, under which the plaintiffs claimed.

The records above mentioned were contained in certain ancient books, purporting to be the records of the Lower Housatonic Proprietary, which were produced by Edward P. Woodworth, who stated, that he was and had been the acting clerk of the proprietary from January 1st, 1844, to the present time. A record of his appointment was also shown. Previous to the appointment of Mr. Woodworth, it appeared, that, for fifty years, Silas Kellogg had been chosen and acted as clerk of the proprietary.

The defendants objected, *first*, to the admission of the books of record, on the ground, that no competent evidence had been previously given of the original and continued organization of the proprietary, and of the election and qualification of Kellogg and Woodworth, as clerks; *second*, to the admission of certified copies of deeds, from the registry of deeds, which were admitted in proof of the conveyances from John Granger to Moses King, from Moses King to Philip Livingston, and from the latter to Reuben King, on the ground, that such deeds did not appear to have been legally executed, acknowledged and recorded; *third*, that the deeds above mentioned and the devise from Bohan King were insufficient to prove a conveyance of the whole original right and title of Moses King to the plaintiffs; and, *fourth*, that the recital in the deed from Philip Livingston to Reuben King, that the latter had purchased Moses King's "right of redemption in the lands and premises" therein mentioned, showed that the deed from Moses King to Philip Livingston was a mortgage, and, therefore, that the locations made on

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his right, subsequent to such conveyance, were properly made.

The defendants' objections being overruled, they introduced in evidence, to prove a title in themselves, a warranty deed of the premises in question, from Jedediah Burrill to them, dated April 27th, 1846; and also a schedule of the locations on the right of Moses King, as already stated, extracted from and verified by the records of the proprietary and the testimony of Woodworth the clerk.

The jury returned a verdict for the plaintiffs. If the rulings of the presiding judge were right, and, upon the case as above presented, the plaintiffs are entitled to recover, judgment is to be entered for them on the verdict; otherwise, the verdict is to be set aside, and a new trial granted.

On the hearing in this court, the defendants objected further, that the deed from Henry King to Seth King, one of the plaintiffs, did not convey any estate in Sheffield, but only in Great Barrington; and, also, that by the terms of the devise, introduced by the plaintiffs, from Bohan King to his grandchildren, it appeared, that Bohan King was not the sole heir of Reuben King, but that the latter had a daughter, whose issue survived him; that Bohan King was consequently entitled to no more than a moiety of the proprietary right of Moses King; and that such moiety had been wholly exhausted by the locations admitted to have been rightly made to Bohan King and his devisees, previous to June 8th, 1832.

I. Sumner, for the plaintiffs.

B. Palmer, for the defendants.

Dewey, J. 1. The ancient books, purporting to be records of the Lower Housatonic Proprietary, were properly admitted as evidence, without any further proof of the original and continued organization of the proprietary. This species of evidence is that usually introduced in tracing ancient titles, and has been long sanctioned by this court.

2. The original right of John Granger appears, from the evidence, to have been legally transferred to Moses King.

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3. The right of Moses King, by virtue of the deeds of Moses King to Philip Livingston, and of Philip Livingston to Reuben King, became vested in the latter. These deeds were properly authenticated to make them competent evidence. They operated, as against the grantor and his heirs, to convey all the right in the premises, which Moses King had therein at the time of the execution of the deed from him to Philip Livingston, and, as against all persons, from the time of the registry thereof, on the 3d of September, 1736.

The question, whether the right of Moses King, to make locations in the proprietary, had been exhausted by locations made in his name, and under his authority, must be settled by reference to the locations made prior to his deed to Philip Livingston; for, after that conveyance, he ceased to have any right of further location.

There is nothing in the case, to show that this deed was a mortgage, except the recital in the deed from Livingston to Reuben King, which assumes that the latter was already the holder of Moses King's equity of redemption in the premises. We do not perceive that there is any thing, which affects the case, in the suggestion of the defendants, that the deed from Moses King was a mortgage.

The right of Reuben King, on his decease, descended to his heirs at law. By the parol evidence, given at the trial, it appeared, that Bohan King was the son of Reuben King, and, of course, an heir at law; and, for the purposes of the trial, it was assumed, that he was the sole heir. But, it is now objected, that it is apparent from the documentary evidence put into the case by the plaintiffs, to show their own title, namely, the will of Bohan King, that there were two heirs to the estate of Reuben King, he having also a daughter whose issue survived him. No deed or title is shown by the plaintiffs from those thus entitled to a moiety of Reuben King's estate. This objection is now relied upon, and, as it is open to the defendant, there must be a new trial; and the plaintiffs will then have an opportunity to supply the defect in their title, if they have any conveyance from the coheirs of Reuben King.

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Without such title, and supposing Bohan King only entitled to one half the estate of Reuben King, the plaintiffs had exhausted their whole right to make locations, before the 8th of June, 1832, when the location was made, which is the present subject of controversy. On the other hand, if the plaintiffs succeeded to the entire right of Reuben King, it would seem, from the book of locations, that they had not exhausted their right prior to that time. Upon that point, however, it will be open to either party, on the new trial, to add to the former evidence any further proof which they may have to present.

5. We perceive no objection to the children of Henry King claiming title, under the clause "to the lawful heirs of my son Henry King," to the estate given them by the will of Bohan King, so far as he was the lawful owner. In the absence of any proof that he had acquired the title of his coheir, his interest therein, as already suggested, must be taken to be a moiety only.

6. Seth King, one of the plaintiffs, was not a child of Henry King, and does not derive his title directly as devisee under the will of Bohan King. It seems that Harriet King, a child of Henry King, and one of the devisees of Bohan King, died in 1834, without issue and unmarried, and, upon her decease, her interest in the premises in controversy passed by the statute of descents to her father, as sole heir at law. Her father, Henry King, on the 2d of June, 1837, executed a deed, of which a copy is in the case, to Seth King, releasing to him, his heirs and assigns, "all right, title, and interest, that I have or ought to have to a tract or parcel of land situated in Great Barrington, being the same that was bequeathed by my father Bohan King, deceased, to my children."

The title acquired under this deed is the only title of Seth King to any interest in the premises in question. The land, which is the subject of the present action, lies wholly in the town of Sheffield, and it is objected, on the part of the defendants, that the effect of the conveyance from Henry

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King to Seth King is only to release his interest in lands in Great Barrington. Such certainly is the language of the deed, and the locality is fixed by the terms of the deed. It is said in answer to this, however, that the concluding part of the description, "being the *same* that was bequeathed by my father Bohan King to my children," will extend the conveyance so as to embrace all the land so bequeathed by Bohan King. This construction, we think, cannot be given to the latter clause; which has an appropriate application to the premises conveyed, if they only include the part of the lands bequeathed, that lies in Great Barrington. They were thus bequeathed. The grantor having distinctly named the town of Great Barrington, as the town in which the lands conveyed were situate, we do not feel authorized to give effect to the conveyance as a deed of lands in Sheffield. As the right of Seth King, to join in this action, fails to be established, it will be necessary for the plaintiffs to amend their writ, in this respect, before proceeding to trial.

Verdict set aside and new trial ordered.

Newton Snow *vs.* The Inhabitants of Adams.

Obstructions in a highway, though not on the travelled part, are defects, for injuries caused by which towns are responsible, under the statute (Rev. Sts. c. 25, § 22), whether placed there by the owner of the soil, over which the highway is laid, or by others.

In an action on the case, against a town, on the Rev. Sts. c. 25, § 22, it is sufficient, in the declaration, to describe the highway as "a common road or highway, leading from the south village in Adams aforesaid, to the south line of said Adams, near to Jenks's factory in Cheshire;" but if such description leave the precise road intended in doubt, the defendants should require the plaintiff to give a more particular description, before going to trial; such want of certainty cannot be made the subject of a motion in arrest of judgment.

Where, in an action on the Rev. Sts. c. 25, § 22, it was averred in the declaration, "that said common road or highway was then and there greatly defective and obstructed by large quantities of logs, planks, slabs, and boards, piled up and extending along either side of said highway or common road, and so near to the beaten track and travelled path, as to be a great nuisance, and dangerous to travellers and passengers, with their horses and carriages, and that said highway or common road was blocked up and the limits of travel so narrowed and

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obstructed, as to render the same hazardous and dangerous to travellers and passengers;" which defects, &c., the defendants had long suffered to remain, &c., and that the plaintiff, on, &c., was carefully driving a horse and buggy, "in and upon that part of said highway, or common road, so defective, out of repair, and obstructed as aforesaid," and that his buggy was upset by means of such obstructions, to wit, "by certain logs, planks, slabs and boards, permitted by the defendants to lie within the limits of said road, and near to the travelled path or beaten track," &c.; this was held to be a sufficient averment, that the obstructions were within the highway.

In an action on the Rev. Sts. *c.* 25, § 22, it is not necessary to a description of the defects or obstructions complained of, that the length and breadth of the nuisance should be alleged.

THIS was an action on the case, to recover damages for an injury sustained by the plaintiff, while travelling on a highway in Adams, on the 29th of July, 1846. The highway in question was laid out four rods, and the travelled part directed to be made sixteen feet, in width. The trial was before *Forbes*, J., in the court of common pleas.

It was in evidence, on the part of the plaintiff, that, at the time of the alleged injury, he was travelling in a one horse wagon, in and along the highway referred to; that, when near the factory of the Messrs. Arnolds, his horse suddenly took fright, and sheered to the west side of the road; that, in consequence, the wagon came in contact with a log, the end of which was towards the occupied travelled path, and was thereby partly upset; that the plaintiff, by the upsetting of the wagon, was thrown down upon some boards, which were on the log above mentioned and another lying parallel with it, and was thereby injured.

The plaintiff also introduced evidence, tending to prove the existence of other obstructions on the opposite side of the highway, for the purpose of showing that such obstructions might have been the means of frightening the horse; but there was no positive evidence of the cause of the fright.

It was admitted, or in evidence, on the part of the defendants, that the Messrs. Arnolds were the owners of the fee of the highway; that the logs were placed by them within the limits of the highway, in the month of June previous, for the purpose of hewing thereon the lumber for the frame of their factory, which was then building; that, when the factory

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was finished, which was a few days previous to the accident, the boards and other materials remaining were piled by the Messrs. Arnolds, for their own convenience, on the logs above mentioned, and were there at the time of the injury complained of; that, notwithstanding the alleged obstructions, a safe and convenient travelled way of more than sixteen feet in width was left; and that the obstructions were not such as to cause any danger or inconvenience to the public in the use of the road.

The defendants objected, in the course of the trial, that they were not liable, under the statute, for an injury caused by obstructions placed within the limits of the highway by the Arnolds, as above stated; but the judge ruled otherwise.

The plaintiff contended, that the logs and lumber were an obstruction within the limits of the highway, for the existence of which, and for the injury thereby sustained, the defendants were liable in this action.

The defendants contended, that towns are only liable for obstructions within the travelled path, or so near it as to be evidently dangerous; that when owners of the soil, over which a way is located, place materials within the limits of the highway (out of the travelled path), which, by men of ordinary care and prudence, would not be regarded as exposing to injury the persons or property of travellers, or those in the lawful enjoyment of the road; and when no complaint regarding the materials has been made, nor express notice given to the town of their being obstructions, in which case, the materials may have so remained for a long time; that, though an accident, resulting in an injury to the person or property of a traveller, may happen by reason of the materials so placed, yet, for such cause, the town would not be liable.

But the jury were instructed, that it was incumbent on the plaintiff to prove, that, by reason of these obstructions, the highway was rendered defective, unsafe, and inconvenient for travellers, with their horses, teams and carriages; that the injury was received in consequence of such defects; that, for

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the purpose of showing that the injury arose from a defect in the highway, and not from the fault of the plaintiff, he must prove that he was using a horse that was gentle and manageable, and free from the vice of shying, and that he was driving with ordinary skill and care; that he must further prove, that the defect had existed for the space of twenty-four hours before the injury; and that if, upon the evidence, the jury should find these facts in favor of the plaintiff, the defendants would be liable.

The jury returned a verdict for the plaintiff, on these instructions, and the defendants filed exceptions thereto, so far as the same were unfavorable to them.

The defendants also moved in arrest of judgment, in this court, for the following alleged defects in the plaintiff's declaration:

1. That it contains no sufficient description of the highway complained of.

2. That it contains no proper averment or allegation, that the obstructions in question were in and upon any highway in Adams.

3. That it contains no proper or sufficient description of the defects or obstructions complained of.

Those parts of the declaration, which were relied upon to sustain the motion in arrest, are particularly stated in the opinion of the court.

I. Sumner, for the defendants, in support of the exceptions, referred to *Howard* v. *N. Bridgewater*, 16 Pick. 189, and *Lobdell* v. *New Bedford*, 1 Mass. 153;—in regard to the second ground of the motion in arrest, to *Comm'th* v. *Allen*, 11 Met. 403, and *Comm'th* v. *Hall*, 15 Mass. 240;—and, as to the third, to 3 Chitty C. L. (4th Am. Ed.) 587, 605, and Hawk. P. C. *c.* 76, §§ 229, 231.

H. W. Bishop, for the plaintiff.

METCALF, J. We are of opinion that the ruling of the judge who tried the cause was correct. Obstructions are defects in a road; and towns are no less liable for injuries caused by obstructions placed in a road by individuals, than

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for injuries caused by any other defects. *Bigelow* v. *Inhab'ts of Weston*, 3 Pick. 267; *Frost* v. *Inhab'ts of Portland*, 2 Fairf. 271; *French* v. *Inhab'ts of Brunswick*, 8 Shep. 29. It is the duty of towns to keep their roads, at all seasons, safe and convenient for travellers; and they are as much bound to remove obstructions caused by the owners of the soil over which the road is laid, as any other obstructions.

We are also of opinion that the instructions to the jury, to which the defendants have excepted, were correct. Indeed we perceive nothing in them, which is not included in the ruling previously made. The exceptions are therefore overruled.

The defendants have filed a motion in arrest of judgment, and have, in argument, made three objections to the plaintiff's declaration. The first is, that it does not contain a sufficient description of the road. The description is this: "A common road or highway, leading from the south village in Adams aforesaid, to the south line of said Adams, near to Jenks's factory in Cheshire; which said common road or highway the said inhabitants of said town of Adams were then, long before, and ever since, and now are, by law obliged to keep in repair," &c. This seems, from the reading, to be a description sufficient for all useful or legal purposes. If, however, it could have left the defendants in doubt respecting the very road intended by the plaintiff they should have asked him to give them a more minute description, before going to trial.

The next objection to the declaration is, that it does not aver that the obstructions were within the road. But we find the fact to be otherwise. The averments are, "that said common road or highway was then and there greatly defective and obstructed by large quantities of logs, planks, slabs and boards, piled up and extending along either side of said highway or common road, and so near to the beaten track and travelled path, as to be a great nuisance, and dangerous to travellers and passengers, with their horses and carriages, and that said highway or common road was blocked up, and the

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limits of travel so narrowed and obstructed, as to render the same hazardous and dangerous to travellers and passengers; which defects, want of repairs, and obstructions, the defendants had long and unnecessarily suffered to remain, endangering the lives and property of the citizens of this commonwealth; and that the plaintiff was, on the said 29th day of July aforesaid (1846), carefully driving a horse, attached to a buggy, in and upon that part of said highway or common road, so defective, out of repair, and obstructed, as aforesaid, and that his said buggy was upset by means of said obstructions, to wit, by certain logs, planks, slabs and boards, permitted by the defendants to lie within the limits of said road, and near to the travelled path or beaten track; and the plaintiff was thrown out," &c. This part of the declaration is not very compactly framed; but when all of it is taken together, it sets forth, with sufficient clearness, that the obstructions complained of were within the limits of the road. If there had been only the first averment, namely, that "said road was obstructed by large quantities of logs, &c., piled up and extending along either side of said highway," the declaration might, perhaps, have been defective.

The last objection made to the declaration is, that the obstructions are not therein sufficiently described. In some of the old English books, it is said that in an *indictment* for a nuisance in a highway, it is necessary to allege the length and breadth of the nuisance. But it has been held, for nearly a century, that this particularity is unnecessary. *Rex* v. *Smith*, Sayer, 98; *Rex* v. *Brookes*, Sayer, 167; *Rex* v. *Inhab'ts of East Lidford*, Sayer, 301. *A fortiori* is it unnecessary in a civil action.

The motion in arrest is overruled, as well as the exceptions, and the plaintiff will have judgment on the verdict.

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THOMAS G. STEARNS & others *vs.* AUSTIN W. KELLOGG & others.

The facts, set forth in a creditor's petition under § 19 of the insolvent law (*St.* 1838, *c.* 163), must be proved by competent evidence, before a warrant can be issued thereon; and an affidavit, taken in another state, by which it does not appear, that the adverse party had notice of the taking, or that it was impossible to give him such notice, as required by the Rev. Sts. *c.* 94, § 33, is not such evidence.

METCALF, J. This is a petition of the attaching creditors of William B. Bennett, praying that proceedings against him, under the insolvent law of 1838, may be stayed. The petitioners allege that, after they had attached his property to secure debts which he justly owed them, the firm of Ward & Heath preferred a petition to a master in chancery, praying that a warrant for the seizure of all his estate, real and personal, might issue, pursuant to the provisions of said law; that such warrant was issued and executed; that the master proceeded to call meetings of Bennett's creditors, who chose the respondents to be assignees of his estate, and that the master had assigned it to them. The petitioners then aver that the proceedings of the master, in numerous particulars, were unwarranted and erroneous.

The court have found it necessary to consider only one of the alleged errors in these proceedings; namely, the proof which the master received of the petitioning creditors' claim against Bennett, previously to the issuing of the warrant.

By the insolvent law, (*St.* 1838, *c.* 163, § 19,) a warrant to take possession of an insolvent debtor's estate, upon the petition of a creditor, cannot be issued, unless the facts set forth in such petition shall appear to a judge of probate or master in chancery to be true. And they must be proved by competent evidence. *Ex parte Jordan*, 9 Met. 292. The only evidence of the petitioning creditors' claim, in this case, is the following affidavit, taken in New York: "State of New York. City and county of New York, ss. George Swartwout, being duly sworn, saith that he resides in the city of New York, and that he is salesman for the firm of Ward

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& Heath, merchants, trading in said city; that this deponent knows William B. Bennett, of Great Barrington, in the state of Massachusetts, and knows, of his own knowledge, that said Bennett bought two parcels of merchandise of said Ward & Heath; that is to say, one parcel in bill of goods, on the 29th day of September, 1846, and one parcel in bill of goods, on the 28th day of October, 1846; the first amounting to $210·26, and the latter to $156·96; that the account hereto annexed is a just, true and correct account of said parcels or bills of goods purchased by said Bennett, as aforesaid, and of each and every item of such goods, with the prices of the same, as agreed for by said Bennett; that said goods were duly delivered to said Bennett, by forwarding the same to him at Great Barrington, pursuant to his orders; and that said Bennett has not paid for the same, and that said Bennett is justly indebted to said Ward & Heath, in the full amount of said bills, being the sum of $367·22. G. Swartwout.

"Subscribed and sworn to this 4th day of January, 1847, before me, J. W. Balestier, Massachusetts commissioner for the state of New York, residing in New York."

No notice of the taking of this affidavit appears to have been given to the debtor, and no reason appears for not giving him such notice. For this cause, we are of opinion that the affidavit was not competent evidence of Bennett's debt to Ward & Heath. By the Rev. Sts. c. 94, § 33, "all depositions and affidavits, taken out of the state, in any other manner than is prescribed in the three preceding sections," (namely, depositions taken under a commission, upon interrogatories filed,) "if taken before any notary public," &c., "may be admitted or rejected, at the discretion of the court; provided, that no such deposition or affidavit shall be admitted, unless it shall appear that the adverse party had sufficient notice of the taking thereof and opportunity to cross-examine the witness, or that, from the circumstances of the case, it was impossible to give him such notice."

The affidavit was therefore improperly received by the master, as evidence of the petitioning creditors' debt; and for

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that reason the warrant to take possession of the debtor's property was improvidently issued, and must be superseded.

All further proceedings in the premises are to be stayed, and the property, which was seized on the warrant, is to be restored to the hands from which it was taken.

I. Sumner, for the petitioners.

J. Rockwell & C. N. Emerson, for the respondents.

EDWARD W. B. CANNING *vs.* THE INHABITANTS OF WILLIAMSTOWN.

The damages recoverable against a town, under the Rev. Sts. *c.* 25, § 22, are for an injury to the person or property only, and not merely on account of a risk or peril, which causes fright and mental suffering; but, where an actual injury to the person is sustained, however small, which causes or is necessarily attended with mental suffering, that suffering is a part of the injury, for which the town is liable in damages.

THIS was an action on the case, to recover damages for an injury sustained by the plaintiff, in consequence of a defect in a bridge in the town of Williamstown. The trial was before *Forbes*, J., in the court of common pleas.

It was in evidence, that the plaintiff was riding over the bridge, in company with two other persons, in a light carriage drawn by two horses; that when the horses had arrived near the centre of the bridge, it gave way, and the plaintiff was precipitated about fifteen feet down upon the rocks and stones in the stream below, by which he was injured in the cheek or side of the face, and became sore and lame; and that the plaintiff, though the injury was not very severe, was, by the accident, put in considerable peril.

It was contended, for the defendants, that they were not liable in damages for the risk and peril sustained by the plaintiff, but only for the actual damage to his person.

It was contended, on the part of the plaintiff, that the life of the plaintiff was put in great jeopardy; that the accident could not have happened in the manner proved, without great

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terror and mental suffering; and that the jury, in estimating the damages, had a right to consider not only the injury to the person of the plaintiff, but also his mental anguish, and the risk and peril attending the accident.

The presiding judge, after calling the attention of the jury to the provisions of the Rev. Sts. c. 25, § 22, instructed them, that towns are liable, in cases like the present, only so far as they are made liable by the express provision of law; and, that for mere risk and peril, no action can be sustained against them; but, that where an injury to the person is sustained, the damages are to be commensurate with the injury; and, that if the injury to the person is of such a character, as to be necessarily attended with mental suffering, such suffering is, within the meaning of the statute, a part of the injury to the person, and may be considered in the estimate of damages.

The jury thereupon returned a verdict for the plaintiff, and the defendants filed exceptions.

D. N. Dewey, for the defendants.

H. Byington, for the plaintiff.

Metcalf, J. The Rev. Sts. c. 25, § 22, provide, that if any person "shall receive any injury in his person," by reason of any defect or want of repair in a road, he may recover of the party, that is by law obliged to repair the road, the amount of damage sustained by such injury.

The argument for the defendants assumes that the plaintiff sustained no injury in his person, within the meaning of the statute, but merely incurred risk and peril, which caused fright and mental suffering. If such were the fact, the verdict would be contrary to law. But we must suppose that the jury, under the instructions given to them, found that the plaintiff received an injury in his person — a bodily injury — and that they did not return their verdict for damages sustained by mere mental suffering caused by the risk and peril which he incurred. And though that bodily injury may have been very small, yet if it was a ground of action, within the statute, and caused mental suffering to the plaintiff, that suffering was a part of the injury for which he was entitled to damages.

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We are of opinion, that there was no error in the instructions; and we cannot presume that they were misunderstood or disregarded by the jury.

Exceptions overruled.

RICHARD VOSBURGH *vs.* JOHN W. MOAK & others.

Where several persons were engaged in playing a game of ball in the public highway, and a traveller lawfully passing thereon was accidentally struck by the ball, it was held, that all the persons so engaged were liable in trespass; provided, that, from the width of the road, and the number of persons usually passing thereon, for the ordinary purposes of travel, the game was of such a character as to be likely to endanger the safety of travellers and passengers, and that the individual, by whom the ball was thrown, was acting in the usual manner of persons engaged in such game.

THIS was an action of trespass, to recover damages for an injury sustained by the plaintiff, from being struck by a ball, thrown by some one of the defendants, who were engaged in a game of wicket.

At the trial, which took place in the court of common pleas, before *Forbes*, J., it appeared, that, on the 8th of April, 1846, the plaintiff was driving with a one horse wagon along a public highway, in the village of Great Barrington, where the defendants and others, to the number of twelve or more, were, at the time, playing a game of wicket; and, while so passing, the plaintiff was struck in the pit of the stomach and much injured by the ball which the players were using.

The highway, where the accident occurred, was four rods in width, three of which were occupied by the travelled path, and was very considerably used for the purpose of travel. On the west side of this road, at the place in question, there was a store, and on the east there were several buildings, one of which was a large flouring mill. The defendants had often played ball in the same place before, and one witness said he had seen ball playing there a hundred times.

At the time of the accident, Fayar Hollenbeck, one of the defendants, whose part in the game was to catch the ball

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after it had been struck, and to throw it back to the person whose business it was to roll it, was stationed in a north-easterly direction from the latter, whose station was at one of the wickets. The plaintiff had passed the wicket a little, and was west of a direct line from Hollenbeck to the person at the wicket. At this moment, Hollenbeck threw the ball with an intention to throw it to the person at the wicket; but the ball being wet, it slipped in his hand, when he was in the act of throwing it, and was thus turned from the intended direction, and struck the plaintiff as already stated.

The other defendants were engaged in the game with Hollenbeck, but they had no other connection with him in the act of throwing the ball.

The defendants requested the court to instruct the jury, that if they should be satisfied, that Hollenbeck designed to throw the ball to one of the other players, — that it was thrown with such design and slipped in his hand, — that, by accident, on his part, he hit the plaintiff, — and that the other defendants had nothing to do with the throwing of the ball in this particular instance, although engaged in the general play, — then such other defendants would not be responsible for the injury occasioned by the accident.

The presiding judge declined to give these instructions, but instructed the jury as follows: "That if the defendants were all engaged in the game of wicket in the public highway, and, if, from the situation of the road, the number of persons passing, or other cause, the game there was of such a character, as to endanger or expose to injury the persons travelling along the road, or their property, and the injury was received by the plaintiff, while travelling along the road, without any fault on his part, the defendants would all be liable in this action; provided the party who threw the ball was acting in the usual manner of persons engaged in the game, although his object was merely to return the ball, and it took a different direction from that intended, by slipping in his hand, and taking a direction towards the plaintiff."

H. Byington & H. L. Dawes, for the defendants, referred

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to *Barnes* v. *Hurd*, 11 Mass. 57; *M'Manus* v. *Crickett*, 1 East, 106; *Scott* v. *Shepherd*, 1 Smith's L. C. 210, note; Roscoe's C. E. 167; 2 Stark. Ev. 7; *Moody* v. *Ward*, 13 Mass. 299; 3 Steph. N. P. 2634; *Philadelphia, &c., Railroad Co.* v. *Wilt*, 4 Wharton, 143.

I. Sumner, for the plaintiff, cited *Morgan* v. *Varick*, 8 Wend. 587; *Phillips* v. *Hall*, 8 Wend. 610; *Williams* v. *Sheldon*, 10 Wend. 654; 3 Steph. N. P. 2635; *Gregory* v. *Piper*, 9 Barn. & Cres. 591; 2 Greenl. on Ev. § 622; *Higginson* v. *York*, 5 Mass. 341; Dunlap's Practice, 21; *Wintringham* v. *Lafoy*, 7 Cowen, 735; *Guille* v. *Swan*, 19 Johns. 381.

Dewey, J. The liability of Fayar Hollenbeck, one of the defendants, does not seem to have been questioned in the prayer for instructions, but the court was asked to instruct the jury, as to the other defendants, that under a certain state of facts assumed by the defendant's counsel, they ought not to be charged in this action. To decide upon this question, however, it becomes necessary to look at the facts as found or admitted in the case, as applicable to all the parties, and the nature of their associated action.

All the defendants were engaged in a game of wicket on a public highway of four rods in width, and three of which were the travelled path. The plaintiff was travelling on the highway in a wagon, with his wife. The plaintiff was in the lawful occupation of the road, and had a right to pass thereon, free from any obstruction, or any exposure to casualties from those occupying the highway for purposes other than passing thereon. The defendants were using the highway for a purpose foreign from the appropriate use of the same. Whether the occupation of a portion of the highway by persons engaged in a game of wicket would necessarily and under all circumstances be a nuisance and punishable as such, it is not necessary now to consider. It is enough that the act of the parties associated in such game upon a public highway becomes illegal, when it endangers the safety of persons actually travelling upon such road. The highway is established for the convenience of travellers, and the use of

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it for any game or sport, that actually exposes or puts to hazard the personal safety of the traveller thereon, is not justifiable, and subjects the party thus using the road improperly, to the payment of all damages occasioned thereby to the traveller. The limits of this road, the amount of travel thereon, the nature of the game, and the circumstances under which the plaintiff received the injury, show a clear case of liability on the part of the person, by whose immediate agency the injury was occasioned. The injury was direct, and was properly the subject of an action for trespass. The further inquiry then is, were all the associates in this game of wicket jointly liable for this trespass? If liable at all, they were liable in trespass, as they were present and engaged in the game when the injury was inflicted. The ground taken in defence is, that if this injury resulted from an accidental misdirection of the ball in the hands of one of the players, the others ought not to be responsible therefor. It may be difficult, in some cases, to define the line with entire satisfaction, as to the cases, where an association or many persons are engaged in a common object, and an injury is inflicted by one individual, without intentional concurrence on the part of the others, or even without intention on the part of the individual who inflicts the injury, and yet the whole number engaged in the common object be liable jointly for the damages sustained by the injured party. However that may be, we think no difficulty exists in the present case. The rule as stated by the presiding judge was stated with entire accuracy and under proper limitations.

The ruling of the court embraced the following requisites or facts necessary to be established before the jury should return a verdict against the defendants as joint trespassers: 1st. It must be shown that the parties were engaged in a common pursuit of a game at wicket on the public highway. 2d. That the game was of such a character, that from the width of the road and the number of persons usually passing thereon, it would endanger persons travelling on the public highway. These instructions would require that the plaintiff

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should satisfy the jury, that the defendants had entered upon a common pursuit of dangerous tendency, which might result in an injury to one using the highway for the ordinary purpose of travel. 3d. The further instruction was, that it was also necessary to charge the defendants, that the individual who threw the ball, which occasioned the injury, should have been acting in the usual manner of persons engaged in the game of wicket. We think these elements all that were necessary to constitute a joint liability, and to render all those engaged in the common object joint trespassers.

Exceptions overruled.

HOSEA MERRILL *vs.* THOMAS A. GOLD.

An action on the case, — to recover damages against the defendant, for falsely representing that he had funds in his hands, for which he was chargeable as the trustee of a debtor of the plaintiff, whereby the plaintiff was induced to sue out a trustee process against such debtor, and the defendant as his trustee, from which the defendant was discharged on his answer, — being submitted to arbitration by a rule of court, it was held, that the arbitrators were not authorized, under such submission, to admit the plaintiff to prove, as a ground of claim, that the defendant's statement on oath in his answer, that he had no funds, was false.

THIS was an action on the case, originally brought in the court of common pleas, against the defendant, an attorney of this court, for a fraudulent misrepresentation. The declaration contained two counts.

In the first count, the plaintiff alleged, that, having a demand which was then due and unpaid against one Harris, the defendant, who was the legally retained attorney of the plaintiff, intending to deceive and injure him, wrongfully and deceitfully represented to him, that he, the defendant, had in his hands and possession certain goods, rights, and credits of Harris, which were attachable, and for which the defendant was liable to answer to the plaintiff, as the trustee of Harris; that, in consequence of this misrepresentation, the plaintiff brought his action against Harris, and the defendant, as his

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trustee, and recovered judgment therein against Harris; that the defendant appeared in the suit, and made answer thereto that he had not in his hands any goods, effects or credits of Harris, and was thereupon discharged as such trustee; and that the plaintiff, in consequence thereof, had been grossly and fraudulently deceived and damnified, had been hindered from enforcing his judgment, had been subjected to great trouble and expense, and had suffered great loss and injury.

The second count was similar to the first, except, that instead of averring that the defendant appeared and answered, and thereby discharged himself, the plaintiff alleged that the defendant, neither at the time of making the false and fraudulent representations, nor at the time of the commencement of the plaintiff's suit against Harris, had in his hands any goods, effects or credits of Harris, against which any execution could issue upon such judgment as the plaintiff might recover against him.

The cause having been referred, by the consent of the parties, under a rule of the court of common pleas, in the usual form, the arbitrators returned their award, accompanied by a special report, into that court, at the last February term thereof, and the defendant moved the court to accept the same.

The plaintiff objected to the acceptance of the award, because it appeared, by the report accompanying it, that the arbitrators did not pass upon all the matters submitted to them, and because it was competent for them to pass upon the facts offered to be proved and set forth in the report.

The objections of the plaintiff were overruled by the presiding judge, and the report ordered to be accepted; and the plaintiff thereupon filed exceptions.

The award was, "that the plaintiff hath not sustained his action, and recover nothing; and that the defendant have and recover the costs of this reference taxed at forty-four dollars and twenty-three cents, and the costs of court, to be taxed by the court."

The report, accompanying and returned into court with the award, and signed by the arbitrators, was in the following terms:

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"In this case, the referees were of opinion that the defendant was not guilty of the fraudulent representations charged in the declaration as therein alleged.

"The plaintiff then asked permission to amend his declaration, or, without such amendment, to offer evidence to show, that, at the time the writ was served on Gold, as trustee of Harris in the suit of Merrill *v.* Harris and Trustee, said Gold, in fact, had moneys in his hands of Harris liable to said trustee process; that, although said Gold might have a lien or claim to part of such moneys in his hands, yet that there was still a balance that should have been held for Merrill by Gold; that Gold was the attorney of Merrill in said suit; that he conducted it in court, and Merrill had no other attorney; that, at October term, 1843, said Gold made his answer, as trustee, which was read on the trial before us in the case, and upon such answer said Gold was discharged.

"The plaintiff wished to offer evidence, which he claimed would show that Gold was, in fact, trustee; that he, Gold, claimed all the moneys for fees and disbursements, some of which were made after he was summoned as trustee, and that he claimed he had a lawful right so to do, while the plaintiff claimed that he had no right thus to hold the money so disbursed after he was summoned; and, if he had no such right, then there would have been a balance due from Gold to Harris, and so he would be trustee; — the plaintiff claiming that Gold's interest, at the time he answered as trustee, was adverse to that of Merrill, for whom he was acting as attorney; and that Merrill was not therefore concluded, by said Gold's answer, from showing he was, in fact, trustee in this case.

"The plaintiff read said Gold's answer, as trustee, on the trial, to support his declaration.

"In the opinion of the referees, a claim founded on such a state of facts was not within the submission; that the matter submitted to them was, whether said Gold had been guilty of any fraudulent representations, upon which said Merrill had acted, and by which he had been injured; that the proposed evidence tended to show that said Gold, if liable at all, was

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liable on the ground, that having, as Merrill's attorney, once secured, by the trustee process, property for the benefit of Merrill, he, by his answer, had prevented his receiving it. The referees did hear the evidence, and were not satisfied that said Gold was guilty of fraud, in stating the facts in his answer as he did. But if, under the submission to us, it is competent to hear and make an award under this submission, upon facts so offered to be proved by plaintiff, we respectfully ask to have the matter recommitted to us, on terms to be prescribed either by the court or ourselves."

E. Merwin, for the plaintiff.

H. W. Bishop, for the defendant.

Shaw, C. J. The court are inclined to the opinion, according to the argument of the plaintiff, that, by the reference of a cause by a rule of court, in the usual form, all technical exceptions to the form of the declaration, and the strict rules of proceeding, are waived by the mutual consent of the parties, on which the rule is founded, and by which the case, or cause of action, is referred and embraced in the submission. *Forseth* v. *Shaw*, 10 Mass. 253. And perhaps the question, whether any matter is or is not within the submission, is well tested by another, to wit, whether the same matter could be introduced by way of amendment, either by varying an existing count, or filing a new one; because, if it is simply another mode of stating the same cause of action, it is admissible, otherwise not.

The case submitted was an action at common law, charging false representations that the defendant had funds, by reason of which the plaintiff summoned him as trustee, and he was discharged, having answered on oath that he had no funds. This was the cause of action sued for; this was the case referred. When the arbitrators were satisfied that the action was not maintained by the proof, the plaintiff then desired to show that the defendant actually had funds, but falsely declared on oath that he had not. This is certainly a cause of action, and the same proof would warrant a conviction of perjury. Rev. Sts. c. 109, § 78. But it would not be

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pursued in an action at common law, but by a special action on the case, given by the statute. No doubt both might be joined, by different counts, in the same action; because, when the plea, issue and judgment are the same, different causes of action may be joined in the same suit.

The distinction is often a nice one, and in this case it is not without difficulty; but the court are of opinion, with the arbitrators and the court of common pleas, that the claim of damages at common law, for a false representation that one has funds, when he has not, and a special action on the case for falsely affirming on oath that he has no funds, when he has, are not the same cause of action; and that a reference of the former does not embrace the latter. In the former, the law would give general damages, according to the loss the plaintiff may have sustained by the fraud; in the latter, the plaintiff is to recover of the defendant his whole debt, or so much of it as remains unsatisfied, out of the defendant's own goods and estate.

Exceptions overruled, and judgment on the award, for the defendant.

JOHN OSTROM *vs.* IRA CURTIS & another, Administrators.
ANDREW G. SHARTS *vs.* THE SAME.

The decision of the judge of probate, upon the question, whether further assets have come to the hands of an executor or administrator, so as to entitle a creditor of an insolvent estate to have the commission of insolvency opened, for the purpose of allowing him to prove his claim, under the provisions of the Rev. Sts. c. 68, § 20, is a judicial act, which is conclusive upon the parties unless appealed from, and such question is not open to inquiry on an appeal from the decision of the commissioners, allowing or disallowing the claim of a creditor.

The claim of a creditor of an insolvent estate, in whose favor the commission of insolvency is opened, under the provisions of the statute above mentioned, is not barred by any of the statutes of limitation, in consequence of the lapse of time subsequent to the closing of the first commission.

Where a creditor of an insolvent estate presented his claim to the commissioners, who, in their report to the judge of probate, returned the same, "not allowed as on file," it was held, that the files of the commissioners were admissible in evidence, as a part and explanatory of the entry on the report; and being so admit

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ted, and it appearing therefrom, that the claim was filed by way of notice merely, and, at the time of the report, was considered as withdrawn, it was held, that such claim had not been adjudicated upon by the commissioners.

These were appeals by the defendants, from the decisions of the commissioners of insolvency on the estate of Philo Upson, late of Egremont, deceased, allowing the claims of the plaintiffs. The claims allowed in favor of Ostrom were two promissory notes, payable on demand, dated March 30th, and April 29th, 1840, and signed by Philo Upson. The claims of Sharts were two accountable receipts for money, signed by the agents of Upson, in New York, and bearing date January 6th and 7th, 1840.

The defendants pleaded the general issue, and filed the following specification of defence:

1. That before these proceedings were instituted, the estate of Philo Upson had been represented insolvent, and commissioners of insolvency had been appointed, who had made their final report, and that the commission had been closed, dividends decreed and paid, and that no further assets had come to the hands of the administrators.

2. That the claims in question had been presented to the commissioners originally appointed, and had been disallowed.

3. That the claims were barred by the statutes of limitation.

On the trial, which took place at the present term, before *Metcalf*, J., it appeared, that Philo Upson died on the 13th of January, 1840, and that the defendants were duly appointed and regularly qualified as the administrators of his estate; that they returned an inventory according to law, and represented the estate as insolvent; that, on the 12th of May, 1840, commissioners of insolvency were appointed, who received and adjudicated upon the claims of creditors, and made their final report on the 4th of May, 1841; that the administrators rendered their accounts from time to time, and paid dividends to creditors, agreeably to the decrees of the judge of probate; that, on the 10th of February, 1846, the administrators presented their fourth account, which was allowed on the 12th of May following,

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showing a balance in their hands, for the distribution of which no decree had been made; that, on the 7th of April, 1846, the plaintiffs presented their several petitions to the judge of probate, setting forth that Upson was indebted to them, respectively, as above mentioned, — that their claims had not been presented to the commissioners, in due form, for allowance, — that further assets had come to the hands of the defendants, since the last decree of distribution, — and praying that their claims might be allowed and paid according to law; that, on these petitions, such proceedings took place, that two of the former commissioners were appointed to receive and examine the claims of the petitioners and other creditors of Upson, whose claims had not been before presented; and that, on the 6th of April, 1847, the commissioners made their report, allowing the claims of the plaintiffs, as above stated, from which allowance the defendants appealed to this court.

In proof of the first ground of defence in their specification, the defendants offered evidence tending to show, as they contended, that no further assets had come to their hands, since the last decree of distribution; but the judge rejected the evidence, on the ground, that it was not competent to the defendants to take this objection.

In proof of their second ground of defence, the defendants introduced the report of the original commissioners of insolvency, returned and filed in the probate court, on the 4th of May, 1841, in which the commissioners, after making a general statement of their proceedings, report a list of claims presented and allowed or disallowed, numbered in order from No. 1 to No. 135, inclusive. Against Nos. 109 and 110 were the following entries made by the commissioners: "109 Andrew G. Sharts, not allowed as on file; — 110 John Ostrom, three notes withdrawn as on file not allowed." The claims thus referred to are the same which are the subjects of the present proceeding.

The plaintiffs thereupon offered in evidence certain documents, which were presented by their attorney and on their

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behalf to the commissioners of insolvency, at a meeting held on the 23d of October, 1840. These documents contained certain memoranda, made thereon by the commissioners, at the time they were presented, which the plaintiffs also offered in evidence. These papers had been kept by the commissioners on their own files, and had never been returned to or filed in the probate court. The defendants objected to this evidence, as incompetent, but it was admitted. From these documents and the memoranda thereon, it appeared, that the claims of the plaintiffs were filed merely as notice, — that they were not adjudicated upon, — and that they were considered by the commissioners as withdrawn.

The judge also ruled, upon the third ground of defence specified, that the claims of the plaintiffs were not barred by the statutes of limitation.

The jury returned verdicts for the plaintiffs, for the amount of their respective claims, and the cases were then reserved for the consideration of the whole court, upon the exceptions of the defendants to the foregoing rulings.

H. Byington, for the defendants. 1 The claims of the plaintiffs are barred by the general statute of limitations. The word "actions," used therein, is intended to embrace every mode of enforcing or recovering a debt or demand, as, for instance, filing a claim in set-off, or before commissioners of insolvency. *Hunt* v. *Spaulding*, 18 Pick. 521; *Guild* v. *Hale*, 15 Mass. 455. The right to recover is barred by the lapse of time, whatever may be the form of proceeding. *Richmond, Pet'r.* 2 Pick. 567; *Grinnell* v. *Baxter*, 17 Pick. 383. If not barred by the general statute of limitations, or by the statutes relating to the limitation of claims against insolvent estates (Rev. Sts. *c.* 68, §§ 4, 20), or of proceedings against executors and administrators (Rev. Sts. *c.* 66, §§ 3, 4), then there is no limitation as to claims of this description. From the case of *Holland* v. *Cruft*, 20 Pick. 321, it may be inferred, that such claims are barred by the general statute of limitations.

2. It appeared by the report of the first commissioners, that

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these claims had been presented, acted upon, and disallowed. If so, they could not be brought forward a second time. The evidence explanatory of the report ought not to have been admitted, as it made no part of the official proceedings of the commissioners, but consisted of mere private memoranda of their own.

3. The proceedings in this court, on an appeal from the court of probate, are not according to the strict course of the common law, but as in the supreme court of probate. The point, therefore, that no further assets had come to the hands of the defendants, was well open to them on this appeal.

H. W. Bishop & I. Sumner, for the plaintiffs. 1. The plaintiffs presented their petitions to the probate court, on the ground, that further assets had come to the hands of the administrators; and the probate court, by allowing the petitions, adjudicated upon and settled that fact affirmatively. The defendants made no objection, and interposed no appeal, and are now estopped to deny that such was the fact.

2. The statutes of limitation contain no provisions, which, in express terms, or by necessary implication, deprive the plaintiffs of their right to proceed in the probate court. Nor is there any reason, from the nature of the subject, why these claims should be barred. An administrator is but a trustee for the distribution of the funds in his hands, and is liable for funds received even more than twenty years after a settlement of the estate. *White* v. *Swain*, 3 Pick. 365. But such distribution might be effectually prevented, if the claims of creditors were barred by the statutes of limitation.

3. The plaintiffs are not precluded by the proceedings before the first commissioners. The record of the probate court shows, that these claims were before those commissioners, and were "not allowed as on file." Referring to the files, it appears, that these claims were presented merely for the purpose of giving notice that such claims were in existence, and might be brought forward. It thus appears, that they were never acted upon, much less disallowed.

Shaw, C. J. One of the objections urged in the present

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case, against the right of the plaintiffs to recover, was, that no additional funds had come to the hands of the administrators; and, on the trial, the court ruled that this question was not open to the defendants. We are now called upon to revise that decision, and the question is, whether it is competent for this court, upon an appeal from the decision of the commissioners, allowing the claims of the plaintiffs, to go into and consider the question of fact, upon which the judge of probate opened the commission. The statute (Rev. Sts. c. 68, § 20) provides, that every creditor of an insolvent estate, who shall not present his claim for allowance to the commissioners, shall be forever barred from recovering the same, "unless further assets of the deceased shall come to the hands of the executor or administrator after the decree of distribution," in which case, the claim may be proved, allowed, and paid, in the same manner as claims for contingent debts. Whenever a creditor applies to the judge of probate, under this provision, his petition must set forth a case, which brings him within the exception, namely, he must allege that further assets have come to the hands of the executor or administrator, and he must substantiate this allegation by proof. This may be a very difficult question to decide. The assets of the estate may have consisted in part of doubtful claims, which, in the final settlement, have been treated as worthless. But some one of the debtors comes to an estate, and is able to pay. Assets may thus come to the hands of the executor sufficient to pay all the debts. The creditors thereupon petition the judge of probate to open the commission, on the ground of the newly discovered assets. We think this is a judicial question for the decision of the judge, and that his decision thereon is final and conclusive, unless appealed from by the party against whom it is made. If the defendants were dissatisfied with the decision of the judge in the present case, an appeal should have been taken at the time. The question whether this was a case for opening the commission should have been made then and in the manner suggested. It is now too late. The present is not

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an appeal from the decision of the judge of probate, opening the commission, but an appeal from the decision of the commissioners, allowing the claims of the plaintiffs.

A second objection was, that these claims are barred by the statutes of limitation. But, we think, that neither the general provision of the statute (*c.* 120, § 1), nor that by which proceedings against executors and administrators are limited to two years and thirty days (Rev. Sts. *c.* 120, § 10), is applicable to the case of a creditor of an insolvent estate; for the reason, that such creditor cannot bring an action, but is only entitled to file his claim before the commissioners, within the time allowed by law. When the commission is closed, every creditor, who has not proved his claim, is forever barred, unless he brings himself within the exception, that is, unless he proves that further assets have come to the estate. If such a creditor proves that further assets have been received, he is then entitled to proceed with his claim in the manner provided by the statute. We think the claims of these plaintiffs are not barred by the statutes of limitation.

The remaining question is, whether these claims have been adjudicated upon and disallowed by the first commission. The suggestion is, that they were presented to the commissioners, and were not allowed, and were thus adjudicated upon. The facts appear to be, that, under the second specification of defence, the defendants produced from the records of the probate court the report of the commissioners containing a list of the claims presented to them, with a memorandum against each of the decision of the commissioners relative thereto. Against the claims of the plaintiffs were written the words "not allowed as on file." The phrase "not allowed" is equivocal, and the words "as on file" refer to something else as explanatory of the short entry. It is true, that a written document is not to be explained by parol evidence; but, where a written document refers to something else, for explanation, that becomes competent evidence, whether it be parol or in writing, as a part of such written document. The files of the commissioners, thus referred to, being produced,

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it appears therefrom, that these claims were not adjudicated upon, but were filed merely as notice that such claims were in existence, and that, when the report was made, they were considered as withdrawn. The report was not a judgment, but was open to explanation by extraneous proof, as already stated. The claims of the plaintiffs are consequently well proved, and judgment must be entered accordingly, and the cases remitted to the probate court for further proceedings.

MILES MINER *vs.* JONATHAN C. STEVENS & another.

A mortgagee, to whom possession of the estate mortgaged has been delivered, on an execution issued upon the conditional judgment, if subsequently disseized by the mortgagor, before the expiration of the equity of redemption, may maintain a writ of entry against such mortgagor.

THIS was a writ of entry, brought in this court, in the form prescribed in the Rev. Sts. *c.* 101, §§ 2 and 3, in which the demandant declared on his own seizin, without setting forth the title, under which he claimed. The tenants pleaded the general issue, and the case was tried thereon before *Metcalf*, J., at the present term.

The demandant, in order to prove his title, gave in evidence a mortgage deed of the demanded premises to him from Jonathan C. Stevens, one of the tenants, to secure the payment of a debt which was overdue and unpaid; also, a conditional judgment in favor of the demandant against the said Stevens, recovered in the court of common pleas, at the October term, 1845, in a suit on the mortgage to foreclose the same; and an execution issued on the said judgment, on which possession of the premises described in the mortgage deed, including the demanded premises, was delivered to the demandant, on the 14th of April, 1846.

The tenants thereupon moved the court to dismiss the action, on the ground, that it appeared to be brought for the purpose of foreclosing the mortgage, and consequently was

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not within the original jurisdiction conferred upon this court by the statute of 1840, *c.* 87, § 1.

This motion was overruled, and a verdict was directed for the demandant, to which the tenants excepted. If the ruling was wrong, the verdict is to be set aside, and the demandant to become nonsuit; otherwise, judgment is to be entered on the verdict.

W. Porter & F. Chamberlain, for the tenants. It appears, from the demandant's own showing, that the conditional judgment alone can properly be rendered, either for him, or against Jonathan C. Stevens; and this court has no original jurisdiction to award such judgment. *Ingalls* v. *Richardson*, 3 Met. 340; *Waters* v. *Randall*, 6 Met. 479; *Loud* v. *Lane*, 8 Met. 517; *Keith* v. *Swan*, 11 Mass. 216. The demandant might have a second execution, or revive the judgment by *scire facias*. *Jackson* v. *Hawley*, 11 Wend. 182; *Griffith* v. *Dobson*, 3 Penns. 228; *Doe* v. *Lord*, 7 Ad. & Ell. 610.

I. Sumner, for the demandant. The relation between the parties is changed by the conditional judgment and possession under it, although the form of action is the same. This action is not for foreclosure, but for an injury to the possession, and the remedy is provided by the Rev. Sts. *c.* 101, § 8.

Shaw, C. J. The only doubt, in this case, arises from the evidence introduced on the part of the demandant, which seemed to show, that he claimed as mortgagee, and was only entitled to the conditional judgment. But this evidence was not necessary. It would have been sufficient, as against Jonathan C. Stevens, to have exhibited the judgment without the mortgage; and the other tenant, who is a mere stranger, cannot, of course, stand on a better footing, in this respect, than the former. But it is immaterial to consider what remedy a mortgagee would have, who, after having entered for condition broken, is ousted by his mortgagor. This is a proceeding, in which the defendants are charged as wrongdoers. They jointly deny the wrong and insist on their

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right, and do not claim to stand upon the footing of mortgagors. The action is therefore against wrong-doers, and not against mortgagors, and rightly brought in this court.

Judgment on the verdict.

David Smith *vs.* Moses Sweet.

The will of a married woman, under the statute of 1842, *c.* 74, is not valid, unless the assent of her husband be given thereto, in writing, and indorsed thereon, during her lifetime.

The facts in this case, which was an appeal from a decree of the judge of probate, are sufficiently stated in the opinion of the court.

H. Hubbard & P. S. Paige, for the appellant.

T. A. Gold, for the appellee.

Forbes, J. This is an appeal from the decree of the judge of probate, approving and allowing a certain writing, as the last will and testament of Martha Sweet. The case has been submitted to this court upon an agreed statement of facts. The writing purports to be the will of Mrs. Sweet. It was executed by her in the presence of three witnesses, when she was of sound mind, and, upon the face of it, appears to be, in all respects, a valid will. It is agreed that, at the time this writing was made, Mrs. Sweet was the wife of Moses Sweet, who is named therein as sole devisee, and that his assent was not indorsed thereon during the lifetime of his wife; but that such an indorsement was made by him, before the writing was presented for probate. It does not distinctly appear, from the statement of facts, that the testatrix left any choses in action, which had not been reduced to possession by her husband. It is stated that she inherited some personal property from her father; but whether that property was taken possession of by the husband and appropriated to his own use during her lifetime, is not stated. We understand, however, from the course of the argument at the bar, that there is

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nothing but real estate, of which the husband was seized in right of his wife, during her lifetime, upon which the will can operate; and the only question made, is, whether the will was properly executed pursuant to the *St.* 1842, *c.* 74. That statute provides, that "any married woman, of the age of twenty-one years and of sound mind, may devise and dispose of, by her last will and testament, legally executed, any property, whether real, personal, or mixed, held in her own right and separate from that of her husband; *provided*, that the rights and interests of the husband, to and in any such property, shall in no way be affected thereby; nor shall such will be valid, unless such husband, if of sound mind and competent to act, shall give his assent thereto, expressed in writing, and indorsed thereon; and *provided*, *also*, that any such will may be revoked by such married woman, at her will and pleasure, and without the consent of her husband."

Several objections, growing out of his construction of this statute, were made by the senior counsel for the appellant, one of which only the court have found it necessary to consider; and that relates to the time at which the indorsement was made. Upon this point, it was urged, that the use of the word "husband" in the statute shows an intention, on the part of the legislature, that the written assent should be indorsed during the coverture. The argument is this: that, upon the death of Mrs. Sweet, Moses Sweet ceased to be her husband; and, consequently, after that event, no indorsement could be made by the *husband*, as required by the act. To sustain this construction, Co. Lit. 29 *b.* was cited. It is probable that arguments of this description would have been listened to with more respect, two centuries ago, than at the present day, when the object is rather to ascertain the real meaning of a statute, than to indulge in nice criticisms upon the force of particular words or phrases. Still, the use of the word may have some tendency to explain the meaning of the act. If, indeed, the meaning were otherwise apparent, and the object, which the legislature had in view, required it, this term might be considered merely as

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a *designatio personæ*. But the meaning being doubtful, the weight of the inference must depend upon the precision and accuracy with which language was used in drawing the act; neither of which, in the present instance, is very remarkable.

It is, however, clear that the indorsement of the assent of the husband is a condition precedent; it is made so by the statute; and, without it, the will of a married woman has no validity: it is simply void. It is true, that a will made during coverture, and republished after the death of the husband, may be good; but in such case it operates as a new will made at the time of the republication. It follows, then, that at the death of Mrs. Sweet, the estate descended to her heirs, in the same manner that it would have done, had no will ever been written. For we are of opinion, that the assent of the husband, after the death of the wife, cannot retroact upon the will in such manner as to render it valid. A will, under this statute, is the joint act of the husband and wife, and must be performed during their joint lives. Were it otherwise, these consequences would seem to follow: viz., there is no will, in contemplation of law, until the assent of the husband is indorsed: of course, there are no means provided by law to compel the production of the writing, for probate. In the mean time, the estate descends to her heirs, at the death of the wife, and passes, perhaps, from them into the hands of strangers, without notice. The estate is, apparently, indefeasible at the time of the descent and conveyance, and yet it is tainted with a secret vice, which may destroy it; for the husband, at any time within twenty years, may assent to the will, prove it, and defeat the estate. We cannot adopt a construction of the statute, from which these consequences might follow, in the absence of any explicit declaration of such intention, by the legislature.

Some aid in the construction of the statute may, we think, be derived from the last proviso. That proviso gives to the wife the power of revocation at her pleasure, and without the consent of the husband. But this power is limited to "any such will;" that is, to a will made according to the act, and

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upon which the assent of the husband has been indorsed. In the present case, the will was executed by the wife, and then placed in the custody of the husband. It was in his power, if so disposed, to retain the possession against the wife, and thus to prevent her from obliterating or destroying the writing. A deed or separate act of revocation would not defeat the instrument; because, not having been executed according to the statute, it was not a will which the statute empowered the wife to revoke. And yet there can be no doubt that the legislature intended to give to the wife, under all circumstances, and at every period during her life, full and unlimited control over any valid will or testamentary paper which she might make during coverture.

Whether this statute empowers a married woman to devise property to her husband at all, is a question upon which we express no opinion.

Decree of the judge of probate reversed.

JOHN F. SANFORD *vs.* MIRON ALLEN & Trustee.

Where the promisor of a note, which is guarantied as "perfectly good and collectible," is insolvent at the time and continues to be so, the holder is not obliged to institute legal proceedings against him, and to prosecute the same to judgment and execution, before resorting to the guarantor.

THE defendant, being the holder of a promissory note, signed by William Williams, for ninety-three dollars, payable to the defendant or bearer by the 1st of April, 1841, on which, under date of April 15th, 1841, was indorsed a payment of forty-four dollars, sold and delivered the same to the plaintiff, and, at the same time, gave the plaintiff a writing, signed by himself, of which the following is a copy:

"This certifies, that I have this day sold to J. F. Sanford a note against William Williams, of Egremont, Mass., amounting now to forty-eight dollars ninety cents, (originally ninety-three dollars,) which note I do guaranty to the said Sanford to be perfectly good and collectible.

(Signed) Miron Allen.

North Ridgeville, August 5th, 1841."

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The plaintiff brought this action for a breach of the guaranty, and, on the trial in the court of common pleas, before *Forbes*, J., introduced evidence to prove that he demanded payment of the note of Williams, within a reasonable time after the 5th of August, 1841; that Williams refused to pay the same; that he gave the defendant notice of such demand and refusal; that, on the 5th of August, 1841, Williams had not sufficient property to pay the amount due on the note, but had then disposed of his property; and that he had ever since been entirely unable to pay the note.

The defendant contended, that, in order to entitle the plaintiff to maintain this action, he must also prove that he had endeavored to collect the note of Williams by a suit prosecuted to judgment and execution.

The judge ruled otherwise, and instructed the jury, that if Williams was insolvent and wholly unable to pay the note, at the date of the guaranty, and had continued to be so; that if he had no property, out of which an execution could have been satisfied, either wholly or in part; and that a judgment and execution against him would have been of no avail, the plaintiff might recover in this action, without proving the existence of such judgment and execution.

The jury rendered a verdict for the plaintiff for the amount due on the note, and the defendant alleged exceptions.

B. Palmer, for the defendant, argued, that the concluding words of the guaranty, "good and collectible," referred to the ordinary mode and course of collecting debts, and that the plaintiff took upon himself the duty of employing all the usual means for that purpose. Witnesses could not know whether the debt was collectible or not; the only mode of proof was the issuing and service of an execution; and the agreement indicated that the plaintiff was to prosecute the claim by a suit, if necessary.

I. Sumner, for the plaintiff, was stopped by the court.

By the Court. We think that the instructions of the judge at the trial in the court of common pleas were correct. In the case of *Marsh* v. *Day*, 18 Pick. 321, the terms, "good

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and collectible," used in the guaranty of a note, were held to mean "capable of being collected." But it does not require the obtaining of a judgment, and an execution returned unsatisfied, as the only evidence that it is incapable of being collected. In the case referred to, suits had been commenced but apparently not prosecuted to judgment. It may be made a condition precedent, if such is the contract of the guarantor; but it was not, we think, so made in this guaranty, and therefore the fact might be proved by other competent evidence.

Exceptions overruled and judgment on the verdict for the plaintiff.

LOCKWOOD CAREY & wife *vs.* THE BERKSHIRE RAILROAD COMPANY.

OLIVER SKINNER *vs.* THE HOUSATONIC RAILROAD CORPORATION.

An action on the case cannot be maintained by a widow, to recover damages for the loss of her husband, or by a father for the loss of service of his child, in consequence of the death of the husband or child, occasioned by the carelessness or fault of the agents or servants of a railroad corporation.

THE first of the above named actions was originally commenced by Eliza Ann Hewins, then the widow of Joseph H. Hewins, and is now prosecuted in the joint names of herself and Lockwood Carey, with whom she has since intermarried. It was an action on the case, to recover damages for the loss of the life of the female plaintiff's late husband, in consequence of the negligence, carelessness, and unskilfulness of the defendants' servants and agents.

On the trial, which took place in the court of common pleas before *Wells*, C. J., at the October term, 1845, the plaintiff (Eliza Ann Hewins, then sole) offered to prove, among other things, that, on the day of the alleged injury, Hewins was employed by an agent of the defendants, with other laborers, to go on the defendants' road, southerly of the station at West

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Stockbridge, as far as the north part of Great Barrington, to shovel snow from the track, in order that the trains might proceed; that he was employed as a day laborer, and to be paid by the day, and was not constantly employed by the company under any contract; that, on the day referred to, Hewins was engaged to clear snow from the track, until a car should be sent down to bring him and the other laborers back, and was directed to remain at work until he should be thus sent for; that this arrangement to bring back the laborers by the cars was made, in order that they might have a longer time to work; that, at evening, the cars were sent accordingly, and Hewins, and the other laborers, who were then at work several miles below, were taken on board the cars and brought back to the station at West Stockbridge; that, when the cars were approaching the station, and making arrangements to run into the place appropriated to them, they were, in consequence of the carelessness and inattention of the switch tender, directed towards and carried to the engine house, the doors of which were closed; that the cars ran against the doors of the engine house, stove them in pieces, and entered the house; that the engine was behind the cars, pushing or backing them up on the track and against the doors of the engine house; that the cars were open or freight cars, and Hewins was sitting on the floor of one of them; that the engineer, seeing the danger, directed those in the cars to clear themselves therefrom; that Hewins, before he could thus clear himself, was thrown from the car in consequence of its striking the door of the engine house; that, on being thrown off, he fell between the tender and the car, and was run over, and so severely injured and bruised, that he died of his wounds in eighteen or twenty hours afterwards; that Hewins's death was occasioned solely by the injuries so received; that he was the husband of the plaintiff, who was poor; and that, by his death, she was left to provide for herself and the support of three small children.

The judge being of opinion, that if the facts stated were proved, they would not entitle the plaintiff to recover, a

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verdict was thereupon rendered for the defendants, and the plaintiff filed exceptions.

H. W. Bishop, for the plaintiffs.

I. Sumner, for the defendants.

The second of the above named actions was also an action on the case, brought by the plaintiff for the loss of service of his son, aged about eleven years, who was killed by the cars of the defendants on the 24th day of February, 1847.

At the trial, which was in this court, before *Dewey*, J., the plaintiff proposed to prove, in order to entitle himself to a verdict, that the death of his son was caused by an accident which took place on the defendants' railroad, by reason of the carelessness or fault of the servants and agents of the defendants.

The case was taken from the jury, by consent, and reserved for the consideration of the whole court, upon the report of the judge.

J. Rockwell & H. Wheeler, for the plaintiff.

I. Sumner, for the defendants.

These cases were separately argued, but, presenting a single question only, for the consideration of the court, they were both embraced in the same opinion.

Metcalf, J. These actions raise a new question in our jurisprudence. No case was cited, at the argument, in which a like action had been the subject of adjudication, or even of discussion. The case of *Huggins* v. *Butcher*, 1 Brownl. 205, and Yelv. 89, was referred to, where there is a *dictum* of Tanfield, J., in which Fenner and Yelverton, Js., are said to have concurred, that "if one beat the servant of J. S. so that he die of that beating, the master shall not have an action against the other, for the battery and loss of service, because the servant dying of the extremity of the beating, it is now become an offence against the crown, and turned into felony, and this hath drowned the particular offence, and prevails over the wrong done to the master, and his action by that is gone." This doctrine is also found in most of the digests and abridgments of the English law. But whatever may be the mean-

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ing or legal effect of the maxim, that a trespass is merged in a felony, it has no application to the cases now before us. In neither of them was the killing felonious, and there is, therefore, no felony, in which a private injury can merge.

If these actions, or either of them, can be maintained, it must be upon some established principle of the common law. And we might expect to find that principle applied in some adjudged case in the English books; as occasions for its application must have arisen in very many instances. At the least, we might expect to find the principle stated in some elementary treatise of approved authority. None such was cited by counsel; and we cannot find any. This is very strong evidence, though not conclusive, that such actions cannot be supported But it is not necessary to rely entirely on this negative evidence. For we find it adjudged, in *Baker* v. *Bolton & others*, 1 Campb. 493, that the death of a human being is not the ground of an action for damages. In that case, the plaintiff brought an action against the proprietors of a stage coach, which was overturned while he and his wife were travelling in it, whereby he was much bruised, and his wife so severely hurt, that she died about a month after. The declaration alleged, besides other special damage, that "by means of the premises, the plaintiff had wholly lost and been deprived of the comfort, fellowship and assistance of his said wife, and had from thence hitherto suffered and undergone great grief, vexation and anguish of mind." Lord Ellenborough held, that the jury could take into consideration only the bruises which the plaintiff had sustained, and the loss of his wife's society, and the distress of mind he had suffered on her account, from the time of the accident to the time of her death. And he announced the principle of his decision, in these words: "In a civil court, the death of a human being cannot be complained of as an injury." Such, then, we cannot doubt, is the doctrine of the common law; and it is decisive against the maintenance of these actions.

We are aware of the case of *Ford* v. *Monroe*, 20 Wend. 210, in which the plaintiff, in an action tried before Cowen, J.,

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recovered damages for the negligence of the defendant's servant, in driving a carriage over the plaintiff's son, ten years old, and thereby killing him. One ground of damage, alleged in the declaration, was the loss of the son's service for the period of eleven years; and the jury were instructed, that the plaintiff was entitled to recover such sum as the service of the son would have been worth, until he became twenty-one years of age. The case went before the whole court on a motion for a new trial; but no question was there raised, concerning the legal right of the plaintiff to recover damages caused by the killing of his son. For aught that appears in the report, that point was assumed, and passed *sub silentio*, both at the trial and in bank.

The English parliament, by a very recent statute, (9 and 10 Vict. *c.* 93,) have provided, that whenever the death of a person shall be caused by a wrongful act, neglect or default, which would, if death had not ensued, have entitled the party injured to maintain an action to recover damages in respect thereof, the person, who would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured shall have been caused under such circumstances as amount in law to felony; such action to be brought within twelve calendar months after such death, by and in the name of the executor or administrator of the person deceased, and to be for the benefit of the wife, husband, parent and child of the persons whose death shall have been so caused; and in such action the jury may give such damages, as they may think proportioned to the injury, resulting from such death, to the parties, respectively, for whose use such action shall be brought. And by our *St.* of 1840, *c.* 80, if the life of any passenger shall be lost by the negligence or carelessness of the proprietors of a railroad, steamboat, stage coach, &c., or of their servants or agents, such proprietors shall be liable to a fine, not exceeding five thousand dollars, nor less than five hundred dollars, to be recovered by indictment, to the use of the executor or administrator of the deceased person, for the benefit of his widow and heirs

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These statutes are framed on different principles, and for different ends. The English statute gives damages, as such, and proportioned to the injury, to the husband or wife, parents and children, of any person whose death is caused by the wrongful act, neglect or default of another person; adopting, to this extent, the principle on which it has been attempted to support the present actions. Our statute is confined to the death of passengers carried by certain enumerated modes of conveyance. A limited penalty is imposed, as a punishment of carelessness in common carriers. And as this penalty is to be recovered by indictment, it is doubtless to be greater or smaller, within the prescribed maximum and minimum, according to the degree of blame which attaches to the defendants, and not according to the loss sustained by the widow and heirs of the deceased. The penalty, when thus recovered, is conferred on the widow and heirs, not as damages for their loss, but as a gratuity from the commonwealth.

We believe that by the civil law, and by the law of France and of Scotland, these actions might be maintained. If such a law would be expedient for us, it is for the legislature to make it.

In the first of these actions, the exceptions are overruled; in the second, the plaintiff is to be nonsuit.

PITTSFIELD AND NORTH ADAMS RAILROAD CORPORATION, Petitioners, *vs.* SARAH FOSTER.

Where proceedings for the assessment, by a jury, of damages for land taken by a railroad corporation, are conducted in part by a coroner, under the Rev. Sts. c. 24, § 23, and in part by the sheriff, it is the duty of each of those officers to certify the proceedings which take place before him; and, in such a case, where the coroner presides, it is no objection to the verdict, that the jury are not attended by a deputy sheriff.

IN this case, which was a proceeding under the authority of the county commissioners for the county of Berkshire, for

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the assessment by a jury of the damages sustained by the respondent, for land belonging to her which had been taken by the petitioners for the purposes of their road, it appeared, that the warrant was directed to the sheriff of the county of Berkshire or his deputy (the sheriff being appointed therein to preside at the trial), and was executed by the sheriff, as to every thing required to be done under and by virtue of the same, previous to the time appointed for the attendance of the jurors; that the sheriff was unable to attend on that day from sickness or some other cause; and that the jury were empanelled, and all the subsequent proceedings under the warrant conducted, by a coroner of the county of Berkshire, by whom the execution of the warrant was duly certified, and the same, together with the verdict of the jury, returned to the court of common pleas.

The petitioners objected to the receiving of the verdict, and moved that it be set aside, on the ground, that the return was made by the coroner, instead of the sheriff or his deputy, and that it did not appear, that the jury were attended either by the sheriff or his deputy. The court overruled the objections, and accepted the verdict; and the petitioners filed exceptions.

H. W. Bishop, for the petitioners.

H. Byington, for the respondent.

Dewey, J. The warrant from the county commissioners was directed to the sheriff, and by him the jury were properly summoned. All the proceedings previous to the time when the coroner was called upon to act, by reason of the necessary absence of the sheriff, are properly certified by the latter. The subsequent proceedings, which took place before the coroner, so far as it is the duty of the presiding officer to certify them, and the return on the warrant, are to be certified by the coroner.

It is no valid objection to a verdict of a jury, where the coroner presides at the hearing by the jury, that the jury were not attended by a deputy sheriff. We see no ground for objecting to the acceptance of this verdict.

Judgment of the common pleas affirmed.

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Miles Miner *vs.* Jonathan C. Stevens & others. Same *vs.* Same.

The plaintiff, who was the mortgagee of certain real estate, brought an action for foreclosure against the mortgagor, one of the defendants, who was in possession, on which suit the conditional judgment was rendered, and a writ of possession regularly issued: Before the commencement of the action, the mortgagor had conveyed his equity of redemption to a third person, who, during the pendency thereof, conveyed the same to the other defendant: At the time of the execution of the writ of possession, both the defendants were upon the premises, and were forcibly ejected therefrom by the officer, who delivered seizin thereof to the plaintiff: The defendants subsequently entered upon the premises and committed acts of trespass, for which the plaintiff brought his action: It was held, that whatever might be the legal effect and operation of the judgment, as to a foreclosure, or the right of the officer to expel the owner of the equity of redemption, the action of trespass might be maintained.

These were actions of trespass to land, tried before *Ward* J., in the court of common pleas, and brought into this court by the defendants, against whom verdicts were rendered, upon exceptions to the instructions of the judge. From the bill of exceptions, the following facts appeared, as the ground of the instructions complained of.

One of the defendants, Jonathan C. Stevens, being the owner of the premises, consisting of a house and other buildings, and lands adjoining, and having mortgaged the same to Miles Miner, the plaintiff, previously to the 21st of April, 1843, made a conveyance thereof, by a deed of bargain and sale of that date, containing general covenants of warranty, to Fuller, Dixon and Smith.

These grantees, on the 11th of November, 1843, executed a reconveyance of the same premises to Jonathan C. Stevens, which was delivered to him about the time of its date, and remained in his possession without being recorded, until the 21st of December, 1844, when it was redelivered to the grantors, Fuller, Dixon and Smith, who thereupon made a quitclaim deed of the premises to Ensign D. Stevens, another of the defendants.

On the 24th of May, 1843, the plaintiff commenced an action for foreclosure, in the court of common pleas, against

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Jonathan C. Stevens, the mortgagor, as sole defendant, on which the conditional judgment was obtained at the October term, 1845, and a writ of possession issued March 18th, 1846.

It was in evidence, that, at the time of the commencement of the action for foreclosure, and at the time of the service of the writ therein, and also at the time of the service of the writ of possession, Ensign D. Stevens, the grantee above mentioned, was upon the premises, and that when the writ of possession was executed, he claimed and attempted to maintain his right to remain, but was forcibly removed by the officer.

The writ of possession was executed by the officer, by ejecting the defendants from the house and land constituting the premises, and delivering seizin thereof to the plaintiff.

The defendants subsequently entered upon the premises, and committed the acts of trespass complained of in these actions, between the 23d of April and the 8th of June, 1846.

At the time of the making of the deed from Jonathan C. Stevens to Fuller, Dixon and Smith, Stevens's property, or some portion of it, was under attachment, and he was much embarrassed and pressed by creditors.

The defendants justified the trespasses, Ensign D. Stevens in his own right, and the other defendants as his servants, on the ground, that, at the time of the commencement of the action for foreclosure, Fuller, Dixon and Smith were the owners of the equity of redemption and tenants of the freehold, and that, at the time of the execution of the writ of possession, Ensign D. Stevens, their grantee, had acquired all their rights in and to the premises; and they contended, that the action for foreclosure having been commenced against the mortgagor alone, and not against Fuller, Dixon and Smith, as tenants of the freehold, and the judgment in that action having been rendered against the mortgagor alone, the proceedings, as against Fuller, Dixon and Smith, and Ensign D. Stevens, as their grantee, were void, and that in forcibly removing Ensign D. Stevens from the premises, in the execution of the writ of possession, the officer was a trespasser.

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The defendants objected, that, upon the evidence, as above stated, in substance, these actions could not be maintained; but the judge ruled otherwise, and instructed the jury accordingly, who found the defendants guilty in both actions.

W. Porter, for the defendants.

I. Sumner, for the plaintiff.

WILDE, J. These cases have been elaborately argued on several points; but as we consider the law to be clear and decisive on one, it is unnecessary to express an opinion on the others.

Both actions depend on the same principles of law. They are actions of trespass *quare clausum fregit*, brought by the mortgagee of the *locus in quo*, against Jonathan C. Stevens, the mortgagor, and the other defendants, who justify the alleged trespass under Ensign D. Stevens, who claims title to the equity of redemption.

Several years before the alleged trespasses, the plaintiff had commenced an action, to foreclose the mortgage, against the mortgagor, who was tenant in possession, although he had before conveyed his equity of redemption to certain purchasers, who, afterwards, during the pendency of the action, conveyed the same to Ensign D. Stevens. After judgment recovered in that action, a writ of possession issued, and possession was given to the plaintiff; and Ensign D. Stevens, who was in possession with Jonathan C. Stevens, refusing to quit the premises, was forcibly expelled therefrom by the officer.

That this was a valid judgment against Jonathan C. Stevens, and that the officer was justified in giving possession to the plaintiff, cannot be controverted. Whether that judgment would operate as a foreclosure of the mortgage, is immaterial. Even if the judgment were erroneous, it would be valid until reversed. But the main objection to the proceedings of the sheriff is, that he was not authorized, by the judgment and writ of possession against Jonathan C. Stevens, to eject Ensign D. Stevens, who was no party to the judgment.

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However well founded this objection may be, we are of opinion, that the defendants cannot avail themselves of it, as a defence in these actions. In *Jackson* v. *Farmer*, 9 Wend. 201, it was held, that a party, having the legal right of entry upon land, might enter by force and defend his possession under his title; subject only to an indictment for a breach of the peace, or, under the statute, for the forcible entry. The same doctrine is laid down by Butler in a note to Co. Litt. 257, and by Spencer, C. J., in *Jackson* v. *Morse*, 16 Johns. 197. The case of *Hyatt* v. *Wood*, 4 Johns. 150, was decided on the same principle. In that case, it was held, that where a tenant holds over the term, and the landlord enters by force, and turns him out, he cannot maintain trespass against the landlord. The same doctrine was laid down by lord Kenyon in *Taunton* v. *Costar*, 7 T. R. 431. He says, "If the landlord" (who, in that case, had given notice to the tenant to quit) "had entered with a strong hand to dispossess the tenant, by force, he might have been indicted for a forcible entry; but there can be no doubt of his right to enter upon the land at the expiration of the term."

We think that Ensign D. Stevens, after notice to quit, had no better right than a tenant at sufferance. The mortgagee has the right to enter and take possession, at any time, and the mortgagor, or the party claiming the equity of redemption under him, is not entitled to emblements, and has no right to the possession. *Keech* v. *Hall*, 1 Dougl. 22. If Ensign D. Stevens had not been dispossessed by the officer, the lawful possession would have been in the plaintiff, and this action might well have been maintained; for the officer had a good right to put the plaintiff in possession; and if he had no right to expel Ensign D. Stevens by force, the question might be, whether he would be entitled to a process for a forcible entry. So it may be a question, whether an action of trespass would lie against the officer, or whether he might not justify by the command of the plaintiff. In *Hyatt* v. *Wood*, Spencer, J., says, that where the party entering on land has a right to the possession, he cannot be made answerable in

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damages to a party who has no right. And the like principle is well settled as to the forcible recaption of personal property wrongfully taken from the owner. For, although he may be liable for a breach of the peace, yet no action of trespass lies. The plaintiff's counsel also insists, with great confidence, that Ensign D. Stevens, having become a purchaser, during the pendency of the plaintiff's action against Jonathan C. Stevens, to recover possession of the mortgaged premises, is bound by that judgment; and the cases cited seem to support this argument. In *Hunt* v. *Hunt*, 17 Pick. 118, it was decided, that when a writ is rightly brought against the tenant in possession, especially against the mortgagor, it may rightfully proceed to judgment, and that the suit cannot be defeated by the act of the mortgagor, by alienating the mortgaged premises; and that all persons coming in under the mortgagor, after suit thus commenced, will be bound by the judgment. The plaintiff's action against Jonathan C. Stevens was undoubtedly rightly brought; although it was not brought against the tenants of the freehold, and would not so operate as to foreclose the mortgage.

But we do not think it necessary to decide these questions, being of the opinion, that if the officer had no right to expel Ensign D. Stevens, still these actions may be maintained; that the plaintiff had the legal right to the *locus*, the actual possession, and the undisputed right of possession; and that Ensign D. Stevens had no right of possession. And, in these actions, it is immaterial whether he was ousted by force or not. The plaintiff had a right to enter and take possession of the mortgaged premises, without a writ of possession, and without the aid of the officer; and, if he had so entered and ousted Ensign D. Stevens, by force, these actions might well be maintained. And so they may be, although the officer may have exceeded his authority; as to which it is not necessary to express an opinion.

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MOSES BENEDICT *vs.* TITUS HART.

Where a party was in the unlawful possession of a farm, lying partly in Massachusetts, and partly in Connecticut, and the owner entered on the Massachusetts side, and demanded possession of the whole, and the other party, being then a short distance on the Connecticut side, and having an ox goad in his hand, thereupon threatened violence to the owner with that weapon, if he did not leave the farm, upon which the owner abandoned his demand of possession; — it was held, that this was a forcible detainer of that part of the farm lying in Massachusetts.

THIS was a proceeding under the Rev. Sts. c. 104, §§ 2, 4, for the forcible detainer by the defendant of certain land particularly described in the plaintiff's complaint, and therein alleged to be held unlawfully and against the right of the plaintiff. The case was submitted to the court upon the following agreed statement of facts:

The land in question constitutes a part of a farm, containing about two hundred acres, lying partly in Massachusetts and partly in Connecticut. The description in the complaint embraces that portion only which lies within the state of Massachusetts. The dwelling-house is on the part which lies in the state of Connecticut; but the farm is divided into lots without reference to the state line, a part of the same lots lying in Massachusetts, and a part in Connecticut. A small part of the meadow, the principal part of the plough lands, and nearly all the pasture lands, are in the state of Massachusetts. At the time of the commencement of this proceeding (which was June 1st, 1843), the defendant was in possession of the whole farm. He had ploughed and planted a number of acres of the part lying in Massachusetts, in the spring of 1843, and had also occupied the pasture lands lying in Massachusetts; and was thus occupying the same on the 1st of June, 1843, without license from the plaintiff. It was admitted by the defendant, that the title to the freehold in the farm, as well that part lying in Massachusetts as the portion lying in Connecticut, was in the plaintiff, at the time of the commencement of the suit.

It was also proved and admitted, that, previous to the

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commencement of the suit, the plaintiff went upon the farm,* and found the defendant and his hands at work thereon a few rods from the state line on the side lying in Connecticut. The lot, in which they were thus at work, extended across the state line, so that about one half of it was in Massachusetts; and, of the latter, a portion was ploughed and planted in the spring of 1843. The plaintiff then and there demanded possession of the farm of the defendant, and requested him to leave the same; intending to demand, and being so understood by the defendant, as well the part lying in Massachusetts as that lying in Connecticut.

The defendant thereupon became enraged, and used violent and threatening language towards the plaintiff, and, having an ox goad in his hand, threatened to put it on to the plaintiff, if he did not leave the farm. It was understood by the parties, at the time, that the defendant intended his threats to apply to the plaintiff, if the latter should attempt to take possession of that part of the farm lying in Massachusetts, as well as that part lying in Connecticut.

The plaintiff contended, upon this evidence, that he was thus forcibly prevented, by the defendant, from taking possession of the premises described in the complaint.

I. Sumner & B. Palmer, for the plaintiff.

H. W. Bishop, for the defendant.

Shaw, C. J. The question in this case seems to be one of fact rather than of law. It is a suit on the Rev. Sts. c. 104, § 2, for a forcible detainer of land, under the clause giving the summary remedy, where "an entry has been made in a peaceable manner, and the possession shall be unlawfully held by force." It appears by the facts agreed, that the plaintiff was the owner of land lying partly in the state of Connecticut, and partly in the state of Massachusetts, and that the defendant was in possession without license. The plaintiff,

* In the agreed statement of facts, it does not appear that the entry and demand of the plaintiff were on the Massachusetts side, but the case was argued upon the supposition that such was the fact.

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as owner, was entitled to the possession, as incident, and therefore the defendant's possession was unlawful.

The only question is, whether the evidence shows that the detention of that part of the farm, which lies in Massachusetts, was forcible. The defendant was in possession of the whole farm, as well that part lying in Massachusetts, as that in Connecticut; the plaintiff entered while the defendant was at work, in a field, through which the line of the state passed, and demanded possession; the defendant, in a rage, and having an ox goad in his hand, threatened violence to him with that weapon, if he did not leave the farm. Supposing this to be within the limits of Connecticut, the question is, whether it was a forcible detainer of the possession of that part of the field lying on the other side of the line, within the territory and jurisdiction of Massachusetts. The menace was to use violence if he did not immediately quit the field, including the part in Massachusetts.

The authorities agree, that it is a forcible detainer, when one who has entered peaceably threatens corporal damage to one who rightfully attempts to enter, or repels him with violence. Com. Dig. Forc. Ent. B. 1. So, in Bac. Abr. Forc. Ent. and Det. B., it is said, that the same circumstances of violence or terror, which will make an entry forcible, will make a detainer forcible also; and, amongst other instances, by way of illustration, it is added, if one threatens to do bodily hurt to the former possessor, if he dare return, or place men at a distance from the house, to assault any one who shall make an attempt to enter it.

If menaces of violence and bodily harm constitute a forcible detainer, *a fortiori* where the party threatening has the means and manifests the disposition to carry them into immediate execution. Such a menace with a weapon in hand, upon one within reach of it, is an assault in law; so presenting a loaded gun at another, within gunshot, with the like menace, is an assault. *Genner* v. *Sparks*, 6 Mod. 173. It was stated by lord Ellenborough, in a case at *nisi prius*, that he had held, that firing a gun loaded with shot into a field was a breaking

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of the close, though it had been doubted. *Pickering* v. *Rudd*, 1 Stark. R. 56. Supposing the defendant had stood on the Connecticut side of the line, with a loaded rifle, capable of commanding every point on the Massachusetts side of the line, and used like menaces against the plaintiff; can it be doubted, that this would have been a forcible detainer? The fact, that the parties stood on the Connecticut side of the line, is immaterial, the force and menaces used being such, as, in our judgment, to constitute a forcible detainer of the close on the Massachusetts side. See *Kinsley* v. *Ames*, 2 Met. 29.

Judgment for the plaintiff.

CHARLES HINCKLEY *vs.* HENRY WILLIAMS & Trustee.

A testator devised certain property in trust, that the trustee should annually expend the income thereof, together with so much of the principal, at his discretion, as should from time to time be necessary therefor, in the comfortable maintenance and support of the testator's two daughters, in sickness and in health, and in supplying them with food, clothing, suitable attendance, and medical aid, &c.; and the trustee invested the funds in a mortgage of real estate, on which interest was payable annually, and on which he had received interest, which had never been called for by the persons or either of them who were entitled thereto, and which still remained in his hands: The trustee being summoned in a trustee process, as the trustee of one of the daughters, and of the husband of the other, it was held, that he was not liable as such.

THIS action was brought to recover the amount of a promissory note signed by the defendants, Henry Williams, Amanda Williams, his wife, (against whom the plaintiff had discontinued), and Mary Robinson.

Levi R. Percival, summoned as the trustee, was the executor and trustee under the will of Levi Robinson, the father of Amanda Williams, and of Mary Robinson.

The testator, after making certain specific bequests, left all the residue of his estate, real and personal, to Levi R. Percival, (whom he also appointed his executor), upon and for the trusts and purposes mentioned in the following clause of his will:

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"In the first place, that he the said Levi R. Percival shall manage said estate in a judicious and faithful manner, during the natural lives of my daughters Mary Robinson and Amanda Williams, and the life of the survivor of them, and upon the further trust, that he the said Levi R. Percival shall annually expend the income of said estate hereby devised to him in trust, and so much of the principal thereof, at the discretion of the said Levi R. Percival, as shall be necessary therefor, in the comfortable maintenance and support of my said daughters, Mary Robinson and Amanda Williams. It is my will and I hereby direct, that my said daughters shall be supported out of my said estate in sickness and in health, and supplied with food, clothing, suitable attendance and medical aid, and that so much of the principal of my said estate, as in the judgment of the said Levi R. Percival may be deemed necessary and expedient, shall be from time to time expended therefor. And upon the further trust, that the said Levi R. Percival shall pay out of said estate the funeral expenses of the said Mary and Amanda; and upon the further trust, that the said Levi R. Percival, after the death of the said Mary and Amanda, and the survivor of them, and after paying to himself a reasonable compensation, to be fixed by the judge of probate for the time being, for executing the trusts of this will, shall pay over to the heirs at law of the said Mary Robinson one half of all the estate herein devised to the said Levi R. Percival in trust, which shall then remain unexpended for the purposes herein expressed, and to the heirs at law of the said Amanda Williams the other half of all the estate herein devised to the said Levi R. Percival in trust, which shall then remain unexpended for the purposes herein expressed."

The supposed trustee further disclosed in his answer, that he had invested the funds so devised to him in trust, amounting to about $680, in a mortgage of real estate, the interest on which was payable annually; and that he had received interest thereon, amounting to the sum of $102, which had never been called for by the persons who were entitled to

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receive the same, or by either of them, and which still remained in his hands.

G. J. Tucker, for the trustee.

W. Porter & F. Chamberlain, for the plaintiff.

SHAW, C. J. The only question here is, whether the trustee is chargeable on his answer, as having any goods, effects, or credits of the principal defendant in his hands. The defendant was the husband of Amanda Williams; and the trustee summoned was the executor and trustee under the will of Levi Robinson, the father of Amanda Williams. By the will of Levi Robinson, deceased, a fund was placed in the hands of Levi R. Percival, in trust, to "manage the same in a judicious and faithful manner during the natural lives" of the testator's "daughters Mary Robinson and Amanda Williams and the life of the survivor of them." It will be necessary to state the terms of that part of the will only which relates to the daughter, Amanda Williams. The will proceeds to provide, that he the said Percival shall annually expend the income of said estate, and so much of the principal thereof, at the discretion of the said Percival, as shall be necessary therefor, in the comfortable support and maintenance of the testator's said daughter, and generally to supply her with food, clothing and necessaries, in sickness and in health, and apply so much of the principal thereto, as in the judgment of the said Percival he may deem necessary; also to pay her funeral expenses, with an ultimate trust for heirs.

It appears to us, that, under this will, no money has ever become due to the husband or to the wife. When nothing remains for a trustee to do but to pay over money on demand, it may be regarded as a debt, and assumpsit will lie for it. *Roper* v. *Holland*, 3 Ad. & Ell. 99. But no such case has ever occurred here. Both income and principal were to be applied to relieve the necessities of the daughter, at the discretion of the trustee, and not in any event to be paid to her. Some stress was laid on the direction to the trustees annually to expend the income, &c.; but, taking the whole sentence together, we think it was at his discretion, and so

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far as he should judge necessary, as well in regard to the income as the principal. But, were the construction of this clause otherwise, it would not vary the result, because the trustee is to apply the money for the use of the *cestui que trust*, and not to pay the money to her. The circumstances disclosed, as far as they may have any effect, would tend to confirm this construction. The fund is quite small, the income of course small, and it might well be presumed that the testator, during the health and prosperity of the daughter, might be desirous that the fund should gradually accumulate to meet the time of want and sickness, and claims for funeral expenses, which he had in view.

Trustee discharged.

COMMONWEALTH *vs.* CALEB B. TURNER.

The act of 1847, *c.* 166, which authorizes towns "to make all by-laws that may be necessary to preserve the peace, good order and internal police" therein, and to annex suitable penalties, &c., subject to the provisions of the Rev. Sts. *c.* 15, §§ 13, 14, 15, does not authorize the making of a by-law by any town, prohibiting the sale therein, by any person not duly licensed according to law, of "any strong beer, ale, or any other intoxicating liquor, in a less quantity than twenty-eight gallons, and that delivered and carried away all at one time."

THIS was a complaint, originally made before a justice of the peace, against the defendant, for selling strong beer contrary to a by-law of the town of Adams.

The defendant, being convicted by the justice, appealed to the court of common pleas; and, on the trial in that court, before *Ward*, J., requested the judge to direct an acquittal, on the ground, that the by-law was invalid on its face. This direction being refused, and the defendant convicted, he alleged exceptions.

The by-law in question was as follows:

Whereas, it appears to the inhabitants of the town of Adams, in town meeting assembled, that it is necessary, in order to preserve the peace, good order, and internal police of the town, that the sale of all intoxicating liquors within the same should be prohibited by law:

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Therefore, it is resolved by said inhabitants, that if any person shall sell in the town of Adams any strong beer, ale, or any other intoxicating liquor, in a less quantity than twenty-eight gallons, and that delivered and carried away all at one time, unless he is first duly licensed by law to do the same, shall forfeit for each offence the sum of twenty dollars.

That each forfeiture incurred under the foregoing provision shall enure one half thereof to the use of the person or persons who shall complain and prosecute for the same, and the other half to the use of the county of Berkshire.

The district attorney stated to the court, that he did not deem it to be his duty to appear for the commonwealth, in cases of this description.

J. T. Robinson, for the commonwealth.

H. W. Bishop & J. C. Wolcott, for the defendant.

Shaw, C. J. The by-law, the validity of which is drawn in issue in this prosecution, purports to be made under the authority of the statute of 1847, *c.* 166. Under this authority, the town of Adams passed the by-law in question, imposing a penalty of $20 upon any person who should sell any strong beer, or other intoxicating liquor, in the town of Adams, in a less quantity than twenty-eight gallons.

The phraseology of the statute of 1847 varies but slightly from the corresponding provision of the Rev. Sts. *c.* 15. It authorizes towns to make all by-laws that may be necessary to preserve the peace, good order and internal police. The provision in the Rev. Sts. *c.* 15, § 13, is, that towns "may make all such by-laws, for directing and managing the prudential affairs of the town, as they shall judge most conducive to the peace, welfare and good order," &c.

The act of 1847 omits the qualifying words, "for directing and managing the prudential affairs of the town." The argument is, that by omitting this limitation, by which the power of towns to make by-laws is restricted to cases affecting their prudential affairs, it was intended by the legislature to confer on towns a power of legislation, limited only by their judgment of what the peace, good order and internal police might render expedient. This power would extend, under such a construction, to every department of the criminal law,

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affecting the public peace; to assaults and batteries, to riots, routs and unlawful assemblies; to forcible entry and detainer; and to all offences involving a breach of the peace. It would also include all acts, which tend to disturb the peace, such as libel and slander; and would extend to the regulation of all places of public resort and amusement, at all times, and under all circumstances. If it were clear from the language used, that the legislature intended thus to delegate their whole power of legislation, on the subject of the criminal law, to towns, it would be a grave question, whether such an act would be within their constitutional authority. But we are satisfied, that such was not the intent of the legislature, in the act of 1847. If the legislature had designed to make so extensive an enlargement of the power of towns, it would have been in terms more explicit, that such purpose would have been expressed.

But further, this statute in terms gives towns the power to make by-laws, to be enforced by penalties, subject to the provisions of the Rev. Sts. *c.* 15, §§ 13, 14, 15. The power is given in general words; but the words are so general as to indicate, that some restriction as to reasonable limits was in the mind of the legislature; and that such restriction was intended to apply, with a just regard to the objects to be attained, and the subject matter on which it was to operate; that is, the power conferred was to be limited to such objects as are usually sought and attained by municipal by-laws. The provision, then, that this power should be subject to the Rev. Sts. *c.* 15, § 13, would limit the objects of it to the direction and management of the prudential affairs of a town; referring to the numerous provisions of law, usages, and judicial decisions, to show what the prudential affairs of a town are. *Comm'th* v. *Worcester*, 3 Pick. 462; *Willard* v. *Newburyport*, 12 Pick. 227; *Spaulding* v. *Lowell*, 23 Pick. 71.

But another consideration, quite decisive, we think, to show that the legislature did not intend to give the unlimited power contended for, is, that they used the term "by-law,' and gave

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the power to make "by-laws." This term has a peculiar and limited signification; being used to designate the orders and regulations, which a corporation, as one of its legal incidents, has power to make, and which is usually exercised to regulate its own action and concerns, and the rights and duties of its members amongst themselves. This has been somewhat extended in the case of municipal and other *quasi* corporations; but a broad distinction has always been made between the authority of a corporation to make by-laws, and the general power of making laws. Had the legislature intended to grant to a town the power claimed for it, in the present case, we think they would have used the term "laws" and not "by-laws."

But whatever other power the legislature intended to confer, we are of opinion, that it did not warrant and give effect to the by-law adopted by the town of Adams, imposing a penalty on all persons for selling strong beer and other intoxicating liquors within the limits of that town, without a license. This is a legislative power, which has been exercised by the government from the earliest times, and at the time when this by-law was adopted, laws of the commonwealth were in force on the same subject, certainly as regards intoxicating liquors, and the by-law makes no distinction. We have not thought it necessary to consider how far the by-law in question is repugnant to the laws of the commonwealth, being of opinion that independently of that consideration, it can not be sustained.

Exceptions sustained.

EPHRAIM K. AVERY *vs.* HENRY STEWART & others.

The proceedings of a town, in the laying out of a highway, though irregular and inadmissible to prove a laying out, may nevertheless be admitted as evidence, to show the commencement of the way, in order to rebut a presumption of a dedication; or as a ground for the presumption of a grant, or a confirmation of the way as actually used, by the owner of the land; or to enable the jury to determine, whether the way is a public or a town way.

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Avery v. Stewart & others.

Under an article in a warrant for a town meeting, "to see if the town will lay out, alter, or discontinue, or otherwise dispose of, any town way," it is competent for the town to vote to lay out, or to discontinue, or to alter, any town way whatever.

In a vote to discontinue a town way, a description of it, as "leading from W. G.'s to the pond," is sufficient.

THIS was an action of trespass to land, tried before *Forbes*, J., in the court of common pleas. The defendants pleaded the general issue, and specified in defence, that the close described in the plaintiff's writ was and for many years had been a public highway, 1st, by a regular laying out as a town road by the town of Richmond; 2d, by dedication; and, 3d, by the immemorial usage of the inhabitants of Richmond and others; that it was a way for the use of the inhabitants of the neighborhood, established by dedication and immemorial usage; that it was a way by prescription for the said inhabitants; and that the defendants had occasion to use the same as such highway.

The plaintiff having given evidence of the acts of trespass complained of, the defendants then introduced evidence tending to prove a dedication of the way in question, and a usage for the inhabitants of Richmond and the public generally to pass over the same, since the year 1799.

In order to rebut this defence, the plaintiff introduced evidence as follows.

It appeared, from the records of the town of Richmond, that a town meeting was called therein, by a warrant dated the 5th of March, 1799, the eighth article of which was, "To see if the town will make any alteration in highways, or do any thing relative to disposing of any;" that, at an adjournment of the meeting held under this warrant, in April, 1799, the following vote was passed:

"Voted to accept the following report of an alteration of a road leading to the pond, viz: 'The selectmen of the town of Richmond, having examined the allowance for a highway lying on the east side of Ebenezer Hotchkin's lot, which was formerly owned by Ephraim Welch, and leading to the pond, beg leave to report: That, in their opinion, the road may be

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shifted to the west line of said lot to advantage, to begin at the corner of said lot near Amos Delano's barn, and thence running easterly on the southerly shore of said pond, as far east as is necessary, in the opinion of the selectmen, to accommodate the inhabitants with a good and convenient place for washing sheep, said road being two rods wide.'"

At the time of this proceeding, the land, over which the road was thus located (if such was the effect of the vote), was owned by Ebenezer Hotchkin, an inhabitant of Richmond, who was also the owner of land east of and adjoining to that occupied by the way. The road was wholly within the town of Richmond, was about one fourth of a mile in length, and two rods wide, connected at the southerly end with another road, and terminating on the north at the pond. The title of Hotchkin, both to the land covered by the road, and to the land east of the road, had come to and vested in the plaintiff by mesne conveyances.

It appeared from the records of the town of Richmond, that an adjourned meeting of the town was held on the 30th of March, 1840, in pursuance of a warrant, which contained an article: "To see if the town will lay out, alter, or discontinue or otherwise dispose of any town way;" and that under this article, the town voted "to discontinue the road leading from William Gates's to the pond." The road thus discontinued was alleged to be the same which was the subject of the proceedings of the town in 1799.

The defendant objected to the introduction of the evidence derived from the records, to prove the laying out of the road in 1799, on the ground, that it was not admissible for any purpose. He objected also to the evidence from the records to prove the discontinuance of the road in 1840, first, because towns have no power to discontinue any other highways than the town ways legally established by them; second, because the article in the warrant was too general and indefinite, to authorize the vote which was passed under it; and third, because the vote of the town was not sufficiently definite in its description of the road proposed to be discontinued

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The plaintiff contended, that the proceedings of the town in 1799, together with the subsequent use of the way, established it as a legal town way, which might be and was legally discontinued by the proceedings in 1840.

The defendants requested the judge to instruct the jury, that if they should be satisfied that the way in question had been used by the public generally, and by people coming from different parts of the commonwealth, for more than twenty years prior to any obstructions by the plaintiff, then it was a public highway, which the town had no right to discontinue.

The presiding judge declined so to instruct the jury, but instructed them, that if the way in question were a town or private way within the town of Richmond, it was discontinued by the proceedings of the town in 1840; that the question for them to decide was, whether the road in controversy were a public highway, or a town way, and if it were the former, that the proceedings of the town in discontinuing it could have no effect upon the rights of the public; that there was no record evidence of the laying out of a public highway; that if the way had been dedicated to the public use, and accepted and used by the public, it was to be considered as a public highway; that if granted to the use of the town, and accepted and used by the town, as a town way, that would be its legal character, and it would be subject to the control of the town; that though the proceedings of the town in 1799 were irregular and invalid, and could not originally have had any binding force upon the owner of the land, or the town, yet that if these proceedings were the origin of the way, and were acquiesced in and assented to by the land owner, and by the town, and if the way were opened and continued in pursuance thereof, the jury would be at liberty to infer that the way was a town way, and to find a verdict accordingly for the plaintiff.

The jury thereupon returned a verdict for the plaintiff, and the defendants filed exceptions.

J. D. Colt, for the defendants, argued, that the proceed-

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ings of 1840 were insufficient to discontinue the way in question:

1. The subject matter to be acted upon at the meeting, namely, the discontinuance of a particular highway, was not expressed in the warrant. The article was so general, that it gave the town no notice of what was proposed to be done and was in fact done under it. *Torrey* v. *Millbury*, 21 Pick. 64.

2. The vote of the town to discontinue did not designate, with the requisite certainty, the road in question.

3. The road, never having been legally laid out, was not a public highway; nor, unless a town road can be established by dedication, was it a town way. But town ways cannot be thus established. *Comm'th* v. *Newbury*, 2 Pick. 51; *Hinckley* v. *Hastings*, 2 Pick. 162; *Comm'th* v. *Low*, 3 Pick. 408; *Stedman* v. *Southbridge*, 17 Pick. 162; *Hobbs* v. *Lowell*, 19 Pick. 405 (Opinion of Morton, J., dissenting); *Valentine* v. *Boston*, 22 Pick. 75; *Larned* v. *Larned*, 11 Met. 421. If established by dedication, it must have been as a public highway, and therefore not within the power of the town to discontinue.

4. If a town way may be established by dedication, the evidence in the present case was insufficient for that purpose. Two things are requisite, an act of dedication, on the part of the owner of the land, and an acceptance, on the part of the public. 2 Greenl. Ev. § 662. But neither of these facts could be inferred from the proceedings of 1799, which were, in their character, adverse to a dedication.

H. Byington & *G. J. Tucker*, for the plaintiff, contended, 1st, that upon the authority of the cases cited for the defendant, a town way, as well as a public highway, might be established by dedication; and, 2d, that the article, in the warrant for calling the meeting in 1840, was sufficient, within the decision in *Blackburn* v. *Walpole*, 9 Pick. 97.

H. W. Bishop replied.

Wilde, J. This is an action of trespass *quare clausum fregit*, and the defendants justify the alleged trespass, on

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several grounds. In the first place, it was contended, that the *locus* was a public highway; and evidence was offered tending to prove a dedication of the same, and a usage of the inhabitants of Richmond, and the public generally, to pass over said road since the year 1799.

To rebut this evidence, the plaintiff introduced the records of the town of Richmond, to prove a laying out of the way in question in 1799, and that afterwards, in 1840, the same way was discontinued by the said town. To the introduction of this evidence, the defendants' counsel objected; but the objection was overruled, and the evidence was admitted; and we cannot doubt that this evidence was admissible, although it might appear that the laying out of the way was not strictly regular and definite as to its location; for it was stringent if not conclusive evidence to prove the commencement of the way, and to rebut the presumption of a dedication of a public highway. It is also good evidence to authorize a presumption of a grant, or a confirmation of the way as actually used by the owners of the land.

There is no doubt, that the inhabitants of a town, in their corporate capacity, are capable of taking an easement, or other incorporeal hereditament, and that they may become seized of a right of way, by grant, prescription, or reservation. So the doctrine was laid down, and we think correctly, by Morton, J., in the case of the *Comm'th* v. *Low*, 3 Pick. 412. It may be difficult to decide, whether the long user of a way, by the inhabitants of a town, and by others, would authorize the presumption of its being a public highway, or a town way, when there is no evidence of the laying out of the way. That was the difficulty in the case of the *Comm'th* v. *Newbury*, 2 Pick. 51. But, in the present case, that difficulty is removed by the records of the town, proving that the way was laid out as a town way. Certainly the evidence admitted was competent and pertinent evidence for the consideration of the jury, in determining the question, whether the way was a public or town way.

The next question is, whether this way has been legally

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discontinued. The objection is, that the warrant, calling the meeting for that purpose, did not give sufficient notice of the proposed action of the town upon the road in question. The eighth article of the warrant was as follows: "To see if the town will lay out, alter, or discontinue, or otherwise dispose of, any town way." This, we think, was sufficient notice to advertise the inhabitants of the town, that they would be called upon to act on the subject of laying out or discontinuing or altering any town way; and that it was not necessary to give any more particular notice. In the case of *Blackburn* v. *Walpole*, 9 Pick. 97, it was decided, that, in order to render valid a vote of a town granting money for a particular object, it is not necessary that the warrant for the calling of the meeting should state specifically that the inhabitants will be called to act on the question of granting money for that purpose, if the subject to be acted on is one which will be likely to require a grant of money. This point, we think, was rightly decided, and it is a strong decision in favor of the sufficiency of the notice in the present case.

It was also objected, that the vote of the town, upon this article of the warrant, was not sufficiently definite, in the description of the road attempted to be discontinued. The vote was, to discontinue the road leading from William Gates's to the pond; and it was competent for the plaintiff to prove where William Gates resided, and thus to establish the identity of the road. And it must be presumed, that such evidence was given, to the satisfaction of the jury, nothing appearing in the report of the case to the contrary.

On the evidence reported, the court was requested, by the counsel for the defendants, to instruct the jury, that if they were satisfied, that the way in question had been used by the public generally, by people coming from different parts of the commonwealth, for more than twenty years, then it was a public highway, which the town had no right to discontinue. The court declined so to instruct the jury; and we are of opinion, that any such instruction would have been erroneous. Persons from other towns have a right to use a town way, as

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well as a public highway. The court therefore very properly left it to the jury to decide, on the whole evidence, whether the way in question were a public or a town way. That was a question of fact for the jury to decide; and we find nothing erroneous in the instructions.

Exceptions overruled.

COMMONWEALTH *vs.* CHARLES WILCOX.

A complaint, on the Rev. Sts. *c.* 47, § 3, which alleges that the defendant did presume to be a retailer, &c., and did sell to a person named therein, a specified quantity of spiritous liquor, is not bad for duplicity; nor is such a complaint defective, for not showing what kind of spiritous liquor the defendant is charged with selling, or to whom it was delivered, or by whom it was carried away.

A warrant, in a criminal case, may be issued by one justice of the peace, upon a complaint made to him, and may be returned with the body of the defendant before any other justice of the peace for the same county, and the offence therein specified tried and determined by the latter.

A COMPLAINT was made to Henry L. Dawes, esquire, one of the justices of the peace for the county of Berkshire, alleging that the defendant, on the day and at the place named therein, "did presume to be a retailer and seller of wine, brandy, rum and other spiritous liquor, in a less quantity than twenty-eight gallons, and that delivered and carried away all at one time, and did then and there sell to one G. M. one pint of spiritous liquor, the same being spiritous liquor in a less quantity than twenty-eight gallons, and that delivered and carried away all at one time; and did then deliver the same, and the same was then and there carried away; he the said Wilcox not being first duly licensed as a retailer of wine and spirits according to law," &c.

On this complaint a warrant was issued by the justice to whom it was made, directing the officer to apprehend the defendant, and to bring him before such justice, or some other justice of the peace for the same county, to answer to the complaint, and to be further dealt with therein, as to law and justice shall appertain.

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In pursuance of the warrant, the defendant was arrested, and carried before E. D. Whitaker, esquire, by whom he was tried and convicted of the offence alleged against him.

The defendant appealed to the court of common pleas, and was there tried before *Ward*, J., on the same complaint; and, being convicted thereon, he then moved in arrest of judgment on the following grounds: 1st, that the complaint does not show what species of spiritous liquor the defendant sold; 2d, that two offences are set forth in one count therein; 3d, 4th, that it does not appear by the complaint, when and to whom the spiritous liquor was delivered, or by whom it was carried away, or that it was delivered and carried away; 5th, that no offence is set forth in the complaint; and, 6th, that the justice of the peace, before whom the defendant was arraigned, had no jurisdiction of the case.

J. C. Wolcott, for the defendant.

W. Porter, district attorney, for the commonwealth.

Dewey, J. The complaint, in the present case, according to the practice which has been repeatedly sanctioned by the decisions of this court, is sufficient to authorize a judgment against the defendant. The only point presented by the exceptions, which is novel and requires particular consideration, is that which relates to the jurisdiction of the justice of the peace, before whom the trial took place. In the present case, the warrant was issued by one justice, and was returned before another, by whom the complaint was heard and tried. The officer having the warrant for service returned it, together with the body of the defendant, to the justice who heard and decided the case, who was not the same magistrate by whom the complaint was received and the warrant issued; but the officer gives no reason in his return for the course which he thus pursued.

The defendant insists, that, under the provisions of the Rev. Sts. *c.* 135, § 8, the justice before whom the case was heard had no jurisdiction of the same. Taking this section of the statute as the sole authority for the jurisdiction exercised by the magistrate, it certainly would seem to favor the

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position taken by the defendant. But we are of opinion, that the second section of the same chapter (Rev. Sts. c. 135,) confers power upon the officer, in a case like the present, to return the warrant before a different magistrate from the one by whom it is issued, and gives jurisdiction to the justice, before whom the warrant is thus returned, to hear and determine the complaint upon which it is founded.

This is in accordance with ancient usage, both as to the form of warrants, and the practice relating to them; and we do not suppose that the legislature intended, by the eighth section of the statute above mentioned, to abrogate or change the practice in this respect. That section was probably introduced with a view to provide for cases, if any such there might be, in reference to which no mode of proceeding was elsewhere prescribed. The authority for issuing the warrant, in the form of a direction to the officer to bring the body of the defendant before some other magistrate, as well as to make the same returnable before the magistrate who issued it, was settled in *Foster's Case*, 5 Co. 59, and is recognized as a legal and proper mode of issuing warrants in criminal cases, in 2 Hale P. C. 112; 1 Ch. Cr. L. 39; Davis's Justice, 26. It is now sanctioned, as we think, directly, by the Rev. Sts. c. 135, § 2. We are of opinion, therefore, that the justice had jurisdiction; and the exceptions are accordingly overruled.

COMMONWEALTH *vs.* MARGARET ROBERTS.

In a complaint on the Rev. Sts. c. 47, it is a sufficient allegation of a sale, in violation of the third section, that the defendant "then and there sold to the complainant spiritous liquor in a less quantity than twenty-eight gallons."

Where a complaint, on the Rev. Sts. c. 47, § 3, alleged that the defendant "sold to the complainant spiritous liquor in a less quantity than twenty-eight gallons, without being first duly licensed as a retailer of wine and spirits, according to law;" it was held, that the latter words did not sufficiently allege, that the defendant was not duly licensed to make the sale complained of.

THE defendant, having been tried and convicted in the court of common pleas, on a complaint originally made and

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tried before a justice of the peace, charging her with an unlawful sale of spiritous liquor, moved in that court, in arrest of judgment; and, her motion being overruled, she appealed to this court.

The complaint alleged, that the defendant "did presume to be a retailer of spiritous liquors, in a quantity less than twenty-eight gallons, and then and there sold to the complainant spiritous liquor in a less quantity than twenty-eight gallons, without being first duly licensed as a retailer of wine and spirits according to law."

The motion in arrest of judgment was predicated on three grounds: 1st, that the complaint set forth no offence; 2d, that it does not allege that the liquor sold was delivered, taken away, or used about the defendant's premises; and, 3d, that, for any thing which appears in the complaint, the defendant might have sold the liquor under a license as a victualler or innholder.

J. C. Wolcott, for the defendant.

W. Porter, district attorney, for the commonwealth.

Dewey, J. This complaint is insufficient as charging an offence under the Rev. Sts. c. 47, § 1, by which the offence of being a common seller of wine, &c., is created and made punishable. There is nothing in the complaint to authorize the inference of such charge. *Comm'th* v. *Stowell*, 9 Met. 569, is decisive on this point. The question then is, whether the complaint is sufficient as a charge of an offence under the third section of the same chapter. Rejecting, as we may, the former part of the complaint, as surplusage, the residue contains a direct charge of a sale of spiritous liquors to the complainant, in a less quantity than twenty-eight gallons. This is a sufficient charge of a sale under the third section; and, if nothing more were requisite, the complaint might be supported under that section, and judgment be rendered against the defendant, as was done in the case of *Comm'th* v. *Leonard*, 8 Met. 530.

But it is urged, that there is no sufficient allegation in the complaint, that the defendant was not duly licensed to make

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such sale. The allegation is, that she was not duly licensed as "a retailer of wine and spirits according to law." If the complaint, upon the face of it, clearly indicated that it charged a sale of spiritous liquors, in a quantity less than twenty-eight gallons, to be carried away from the place of sale, for future use, so that the charge contained in it was exclusively under the third section, then the introduction of the precise negative words of that section, relative to a license, would be sufficient. But the allegation of a sale is entirely general, and there is nothing in the complaint to indicate whether the sale was of liquor to be drank at the time, or to be carried away. If the sale were of liquor to be drank on the premises, then it might have been made by the defendant under a license as an innholder, or common victualler; and there is no allegation in the complaint that the defendant was not licensed as such innholder or common victualler. This allegation is necessary, unless the more general words are introduced, "that the defendant was not duly licensed therefor," which would negative any license. *Comm'th* v. *Leonard*, 8 Met. 530. For want of this averment, the complaint is defective, and the judgment must be arrested.

THE ASHUELOT MANUFACTURING COMPANY *vs.* HENRY MARSH.

The president of a manufacturing corporation has no authority as such to commence an action in the name of the corporation.

IN this action, the counsel for the plaintiffs, in order to show an authority to commence the same, offered to prove, that at the time of the commencement thereof, the Ashuelot Manufacturing Company consisted of three members, namely, Bushrod Buck, of Lanesborough, in the county of Berkshire, who was the president of the corporation, and had in his possession the books and records, Henry Marsh, the defendant, who was treasurer and agent of the company, and resided in

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the territory of Wisconsin, and one Whitney, who was the clerk, and resided in the county of Hampshire, in this state; that the counsel for the plaintiffs commenced the action at the instance and under the direction of Buck, who, as they supposed and believed, was authorized to commence the same; but it was not offered to be proved, that the corporation, in any way, ever authorized Buck to commence the action; nor was there any evidence of any such authority, unless it could be inferred from the facts so offered, in evidence.

The court of common pleas thereupon ordered the action to be dismissed; and the plaintiffs filed exceptions.

J. T. Robinson, for the plaintiffs.

J. D. Colt, for the defendant.

The Court overruled the exceptions, and ordered the action to be dismissed.

HENRY DARLING *vs.* ALEXANDER H. WELLS.
JOHN A. MOOAR & others *vs.* ASA BATES.

The provision of the Rev. Sts. *c.* 120, § 9, that the time of a party's absence and residence out of the state shall not be taken as any part of the time limited for the commencement of an action against him, applies to actions which accrued before the revised statutes went into operation, provided the right of action was not then barred.

The first named case came before the court upon exceptions to the decision of *Wells*, C. J., in the court of common pleas, by which judgment was rendered for the plaintiff upon the following statement of facts agreed by the parties.

The action was brought to recover the amount of a book account, alleged to be due from the defendant to the plaintiff, commencing October 23d, 1832, and ending April 30th, 1834. A part of the account, amounting to $18, was contracted with the plaintiff alone. The residue, amounting to $1·25, was contracted with a firm, of which the plaintiff was the surviving partner. The account was incurred by the defendant; but

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it was never presented to him, nor was any demand for payment ever made upon him, or upon any one in his behalf. At the time when the account was contracted, the plaintiff and defendant were both inhabitants of this state. The defendant, afterwards, and after the cause of action accrued, namely, in the year 1834, left this state, and took up his residence in the state of New York, where he has ever since resided and now resides; and, from which, he came into this state, when he was arrested in this suit.

The court of common pleas rendered judgment for the plaintiff, for the sum of $21·36, being the amount of the account sued for with interest from the date of the writ; and the defendant filed exceptions.

J. T. Robinson, for the defendant.

H. L. Dawes, for the plaintiff.

Shaw, C. J. The debt was contracted in 1832 and 1834. The right of action then accrued, and the statute then in force began to run. In May, 1836, the revised statutes went into operation, by which the statute of limitations was materially changed. By the Rev. Sts. *c.* 120, § 9, it is provided, that if after the cause of action has accrued, the debtor shall be absent from and reside out of the state, the time of his absence shall not be taken as part of the term of limitation. The only question is, whether this last provision applies to debts, which accrued before the revised statutes went into operation, but when the right of action was not then barred. We are clearly of opinion that it does so apply, and that such construction has been practically adopted and applied ever since the revised statutes went into operation. It was so considered, if not directly adjudicated, in the case of *Wright* v. *Oakley*, 5 Met. 400, in which this change of the law of limitation underwent a full discussion; the same doctrine was reaffirmed, as a settled rule, in the case of *Willard* v. *Clarke*, 7 Met. 435; and, upon principle, we think such to be the true construction. When the debt was contracted, the defendant had no vested right in the statute of limitations, which could only affect the remedy of the creditor, and

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had no operation until the term of limitation had elapsed. So, when the revised statutes went into operation, the defendant had acquired no right to the statute bar, and his case was not within the exception of the repealing act, respecting rights accruing or accrued. The whole effect of the new statute was prospective, as it regarded an action to recover an existing debt not barred at the time; and therefore it was not open to the objection against retroactive laws.

Judgment for the plaintiff.

In the second case, above mentioned, which was also an action to recover the amount of a book account, it appeared by the agreed statement of facts, upon which judgment was rendered for the plaintiffs, in the court of common pleas, that when the account was contracted, the plaintiffs and defendant were all inhabitants of the state of Vermont; that the defendant, some short time after the debt was contracted, came into the state of Massachusetts, and resided here awhile; that he then went to reside in the state of New York, from whence he came into this state, where he was arrested in this suit; and that the defendant had not resided in this state six years since the debt sued for was contracted.

J. T. Robinson, for the defendant.

H. L. Dawes, for the plaintiff.

The Court directed judgment to be entered for the plaintiffs, for $10·70, being the amount of the account in suit, with interest from the date of the writ.

First Congregational Society in Becket *vs.* Timothy Snow & another.

Two persons, one as principal and the other as surety, signed a promissory note, the consideration of which was a loan of money to the former, and the principal, at the same time, gave the surety a mortgage, conditioned that the mortgagor should pay the note to the promisee and save the mortgagee harmless therefrom, and should also pay a debt due from himself to the mortgagee; but the

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mortgage was not the inducement for the loan, nor was it made at the request, or for the benefit, or by the procurement, of the promisee: The mortgagor paid the interest on the note for several years, but no part of the principal, or of the debt due from him to the mortgagee, and afterwards died intestate and insolvent, and his estate was never administered upon: The mortgagee was never called upon to pay and never paid either the interest on the note, or any part of the principal, and the recovery of the note against him became barred by the statute of limitations: The mortgagee afterwards sold and conveyed his interest under the mortgage, for a valuable consideration, secured by notes of hand, without notice to the purchaser, or knowledge on his part, that the promisee claimed any interest therein, by way of trust or equitable lien or otherwise; and subsequent conveyances and dispositions of the mortgaged premises were made in like manner, without knowledge or notice of any such claim: The promisee, having brought his bill in equity against the mortgagee and the purchaser under him, praying that the mortgagee might be decreed to pay or assign to the plaintiff, as the equitable owner, the proceeds of the sale to such purchaser; and that the latter might be decreed to hold the premises as the trustee of the plaintiff, subject to his equitable lien, and as security for the payment of his note, and also to pay to the plaintiff, as equitably entitled thereto, the amount due from such purchaser to the mortgagee, for the premises: — It was held, that the bill could not be sustained.

This was a bill in equity, in which the plaintiffs set forth the following case:

On the 20th of October, 1834, Elisha Adams, as principal, and the defendant, Snow, as surety, by their note, promised to pay A. N. Dewey, treasurer of the plaintiffs, or his successor in office, the sum of $329, by the 1st of April then next, with annual interest.

On the same day, Adams, by a deed duly executed, which was recorded the next day, made a mortgage of certain real estate to Snow, to secure him against his liability as surety on the note to the plaintiffs, and also to secure the payment of a note from Adams to Snow of $71. The condition of the mortgage was, that Adams should pay the note for $329, on which Snow was surety, to the plaintiffs, and the note for $71, to Snow. The mortgage was made subject to a prior mortgage to the Massachusetts Hospital Life Insurance Company for $900.

The plaintiffs alleged, that, by the deed to Snow, he became seized in fee and in mortgage, and in trust for them as holders of Adams's note, and subject to the equitable lien created by the deed for the payment thereof.

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On the 11th of July, 1840, Adams released to Snow all his right, &c., in the premises.

The consideration of the note from Adams and Snow to the plaintiffs was a loan of money by the latter to Adams. The note was given to the treasurer for the use and benefit of the plaintiffs, who, at the date thereof, became, ever since had been, and then were the holders of the same. Interest was paid thereon by Adams to January 1st, 1841. No other payment had been made; and the principal sum, and interest from that date, were due at the time of filing the bill. Adams had long since died insolvent and intestate, and no administration had ever been taken on his estate.

On the 11th of July, 1840, Adams released to Snow all his right, &c., in the premises; and on the 12th of April, 1845, Snow sold and conveyed the premises (subject to the prior mortgage above mentioned) to the other defendant, William E. Austin, for the consideration of $766·85, which sum had been duly paid in money and notes.

The plaintiffs alleged, that Austin had notice that the premises were held by Snow in trust for them, and subject to their equitable lien; and that the lien, which attached to the premises in the hands of Snow, as mortgagee, remained attached thereto in the hands of Austin, as his grantee, with notice.

On the 1st of April, 1846, the plaintiffs demanded of Snow such part of the proceeds of the sale of the premises as they claimed to be entitled to; but he refused to deliver the same.

The prayer of the bill was, that Snow might be decreed to pay or assign to the plaintiffs, as the equitable owners, the proceeds of the sale to Austin; and that Austin might be decreed to hold the premises as the trustee of the plaintiffs, and subject to their equitable lien, and as security for the payment of their note, and to pay the amount due to Snow for the premises to the plaintiffs, as equitably entitled thereto.

The defendant Snow, by his answer, admitted the making of the note and mortgage, the death, &c., of Adams, the

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conveyance to Austin, as set forth in the bill, and other allegations in the bill, not hereinafter denied; but he alleged, that, by virtue of the mortgage by Adams to him, he became seized of the premises in fee and in mortgage to his own use, and the use of his heirs and assigns forever, and to the use of no other person whatever, as was apparent from the express language of the deed; and he denied, that he was seized of the premises in trust for the plaintiffs, as the holders of Adams's note, as set forth in the bill, or that by force of the mortgage, a trust or equitable lien upon the premises was created for the security and payment of the note to the plaintiffs.

The defendant further averred, that the plaintiffs made the loan of $329, to Adams, upon the sole security of the note given to their treasurer by Adams and the defendant; that the plaintiffs were no parties to the mortgage, nor was the same made at their request, or for their benefit, or by their procurement, nor were they in any way induced to make the loan in consideration of the making of the mortgage; that Adams, being desirous to borrow the money of the plaintiffs, applied to the defendant to become his surety in the note; that the defendant did agree to become his surety accordingly, upon Adams's agreement with him to give him a mortgage, to secure the payment of a debt then due from Adams to him of $71, and to indemnify and save him harmless against his liability as surety to the plaintiffs on the note to them of $329; that he had never derived or received any benefit or advantage from the mortgage except as security for the payment of $71, due to him from Adams; and that neither Adams nor Austin, nor any other person, had paid the defendant any part of the note for $329, and that no proceedings had ever been instituted by the defendant upon the mortgage to enforce the payment of such note.

The defendant Snow also alleged, that Adams, on the 27th of March, 1837, (which was previous to his release to Snow,) released the mortgaged premises to Eliada Kingsley and Russell R. Kingsley (who shortly afterwards conveyed his interest to the former), for the consideration of $300, paid by

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them, and, at the same time, took from them their bond conditioned to reconvey the premises to him, upon his paying the said sum of $300 and interest within two years, and upon certain other conditions recited in the bond, namely, that Adams should pay them all such sums as they might pay to extinguish previous incumbrances on the premises; that Adams never paid the $300 or any part of the same to the said Eliada, nor any sum which had been paid by the latter to extinguish prior incumbrances; that, on the 11th of April, 1840, the said Eliada mortgaged the premises to the defendant and one Kendall Baird, as security to indemnify them against their liability as sureties on a note to the Housatonic Bank, for $475, of which the defendant was afterwards compelled to pay $150·66, which had not been repaid, but, with the interest thereon, still remained due to the defendant, and, for which, (the said Eliada having since died wholly insolvent), the defendant had no security but the said mortgage.

The defendant Snow further alleged, that, after the making of the last mentioned mortgage, the said Eliada released his interest in the premises to one Huldah Lester, for a valuable consideration, by a deed which was executed previously to the deed from the defendant Snow to the defendant Austin; that the right in equity of Adams to redeem the premises was seized and sold on execution in June, 1840, by Jabin B. Williams, who, on the 29th of August in the same year, by his deed of release, conveyed to the defendant all the right acquired by him in virtue of the sale on execution; that Adams was a poor man and remained in possession of the premises to his death in March, 1845, without objection on the part of the plaintiffs, or of any one else, and without the payment of more than a very small sum as rent; that, on the 1st of April, 1845, the defendant Snow conveyed the premises to the other defendant Austin, by a deed of warranty, subject to the mortgage to the Massachusetts Hospital Life Insurance Company; that the farm, of which the premises consisted, was then valued at $1700, and the amount due on

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the said mortgage being $933, a balance was left of $767, for which the said Austin gave his notes, which the defendant Snow then held; that the defendant Snow claimed to retain to his own use the sum due him on the mortgage given by said Adams and interest, together with the interest paid by him on the mortgage to the Hospital Life Insurance Company, with interest on the same, and the taxes on the premises; and that the said Eliada Kingsley, after the taking of his mortgage from Adams, paid sundry sums of money on the mortgage to the insurance company, and also paid the interest for one year, from April 1st, 1836, to April 1st, 1837, on Adams's note to the plaintiffs.

The defendant Snow further averred, that, at the time of his conveyance to the other defendant, and long before, he had ceased to be liable to pay the note signed by him as surety for Adams to the treasurer of the plaintiffs, and the recovery thereof had been barred by the statute of limitations, and, that having held the mortgage simply as surety (except as to his own debt of $71), he supposed and believed, and still believed, that he had no claim or right by virtue thereof, and that the premises would be held by virtue of the subsequent deeds, subject to the mortgage to the Life Insurance Company, and to the debt to himself of $71; and that the plaintiffs, in his belief, had knowledge of such subsequent conveyances, and never pretended to have any claim on the premises, or that the defendant held the same in trust for them, until long after the conveyance from him to Austin.

This defendant also alleged, that, out of the purchase money of the premises, he ought to be paid his own debt, and all sums which he had paid, as before stated, together with the sum paid by him as the consideration of the deed of release from Williams to him, and the sums paid by Kingsley, deducting therefrom what the defendant had received as rent.

The defendant further answered, that neither Kingsley nor Lester had any knowledge that the plaintiffs claimed or pretended that he held the mortgage in trust for them, and they had and claimed title under the mortgage to Eliada and Russell

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Kingsley; that if any balance should remain in the hands of the defendant, after payment of the claims above mentioned, it ought in equity to be paid to the said Lester; and that the defendant made the deed to Austin, expecting to pay such balance to her, and she expecting to receive it.

The defendant denied, that he gave any notice to Austin, and alleged that he had no knowledge or belief that Austin, at or before the conveyance to him, had any notice, that he, the defendant Snow, held the premises in trust for the plaintiffs.

He also alleged, further, that prior to making the conveyance to Austin, he had repeatedly offered to convey to the plaintiffs all his title in the premises, provided the plaintiffs would pay his claims, and make a deduction of fifty dollars from their demand; which offer was rejected by the plaintiffs.

The defendant, in conclusion, denied that there was any trust created in favor of the plaintiffs, or any of which the court had jurisdiction; that if the court should decide that there was a trust, it was one which ought not to be enforced; but, that if enforced, all sums due the defendant for his debt of $71, — for payment of interest to the Life Insurance Company, — all sums paid as the consideration of the release to him, — the amount paid by him as surety for Kingsley to the Housatonic Bank, — the amount paid by Kingsley for interest, — together with a reasonable compensation for his services as trustee, and for answering to this suit, — should be deducted out of the purchase money, and the balance only, if any, paid to the plaintiffs.

The defendant Austin, in his answer, admitting the conveyance by Snow to him, averred that the same was made subject to the mortgage already mentioned to the Massachusetts Hospital Life Insurance Company for the sum of $933, which this defendant assumed to pay, as a part of the consideration for the purchase; that for the balance, being $767 he gave his notes on interest to Snow, on which only about $20 had been paid; that he took the conveyance in the

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belief that Snow was the lawful owner of the premises, and had good right to sell and convey the same; that he had no notice that Snow held the premises in trust for the plaintiffs, or that there were any liens or incumbrances on the same except the mortgage aforesaid, which he had assumed to pay, or that the premises were charged with any trust whatever; but, on the contrary, that he bought the premises in good faith, and in the belief that he acquired a good title by his deed; nor did he know that any thing was due on the mortgage given by Adams to Snow, or that the plaintiffs pretended to any claim on the mortgaged premises, until long after the conveyance to him; that the said note for $329 had been due upwards of ten years, at the time of the conveyance to him; and that if there were any such trust between Snow and the plaintiffs, there was none between them and this defendant, and that he ought to hold the mortgaged premises discharged of said trust.

The cause was argued on the bill and answer, at the September term, 1847, by *W. Porter*, for the plaintiffs, and *H. Byington*, for the defendants.

The opinion of the court was delivered at the September term, 1848, by

Shaw, C. J. This case being set down to be heard on bill and answer, the facts stated in the answer are therefore not controverted, but admitted to be true. The case, upon the facts, is a very complicated one; but without going at large into it, it will be sufficient to allude briefly to the facts, and to state the questions arising upon them. The case, in many respects, is like that of *Eastman* v. *Foster*, 8 Met. 19, but in some respects it differs essentially.

As to the jurisdiction of this court in equity, that case presented a question as to the distribution of the proceeds of an insolvent estate, of which the court had jurisdiction by the express provisions of the statute, whether the property was chargeable with a trust, or not. And the only question was, whether, in an equitable distribution of effects, amongst parties legally and equitably entitled thereto, property which

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had been mortgaged to a surety, for the sole purpose of securing the payment of the debts, for which he was surety, should be deemed subject to an equitable lien in favor of the creditors having such claims.

A second marked distinction is, that in that case there had been no alteration of the property; parties had been exonerated by the statute of limitations, which they might or might not plead; but the mortgaged premises had not been released, or made the subject of any subsequent mortgage, nor did any claim of any subsequent attaching creditor or incumbrancer intervene; it was solely a question between one class of creditors claiming an equitable lien under those mortgages, and the general creditors, who could only claim the property, as it beneficially stood in the hands of their debtor, at the time of the institution of the proceedings in insolvency.

In this case, the complainants can only claim equity jurisdiction for the court on the ground of trust. Certainly there was no express trust; it was a mortgage from Adams to Snow to secure to him a debt of $71, and to indemnify him against his liability as surety on the note, in virtue of which the complainants now seek to charge the land. Such a trust is not necessarily implied from the fact of giving the mortgage, and it is expressly denied by the answer. But further, it is stated and not denied, that the mortgage from Adams to Snow was conditioned to secure a debt due from the mortgagor to the mortgagee of $71. This debt has never been paid. How can any body, having a mere equitable lien or claim, take the property out of the hands of one who has an equity, accompanied by the legal title, in any other mode than by redeeming?

But further, we think the subsequent conveyances, mortgages, sales of the equity of redemption, without notice or claim, legal or equitable, on the part of these complainants, for a long series of years, after the debtor was dead, and after the liability of the surety was barred by the statute of limitations, must now preclude them from setting up such a claim.

Bill dismissed.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

FOR THE

COUNTIES OF HAMPSHIRE, FRANKLIN AND HAMPDEN, SEPTEMBER TERM 1848, AT NORTHAMPTON.

PRESENT.

HON. LEMUEL SHAW, CHIEF JUSTICE.
HON. SAMUEL S. WILDE, }
HON. CHARLES A. DEWEY, } JUSTICES.
HON. CHARLES E. FORBES, }
HON. THERON METCALF, }

HENRY M. POTTER *vs.* THE INHABITANTS OF WARE.

It is no objection to the competency of a witness called for the plaintiff, that the witness was the attorney who made the writ, — that he was actively engaged in the trial as one of the counsel for the plaintiff, — and that he opened the cause to the jury.

ON the trial of this action, which took place in the court of common pleas, before *Wells*, C. J., the attorney who made the writ, and who was also actively engaged in the trial, as one of the counsel for the plaintiff, and opened the cause to the jury, was called by the plaintiff as a witness, and was allowed to testify as such, against the objection of the defendants. The plaintiff having obtained a verdict, the defendants excepted.

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C. Delano, for the defendants. The question is, whether the attorney in a cause, who is also acting as counsel at the trial, is a competent witness for his client. The question is a new one in this court. It has been the usage, indeed, to admit the attorney or counsel of a party, provided he were otherwise competent, as a witness for his client. But the question is, what is the law of evidence touching this point?

Evidence of this description ought to be excluded, on grounds of public policy, as well as upon authority. The rules of evidence are founded in the experience of mankind; and according to the experience, both of the bench and of the bar, the practice of allowing the counsel in a cause to give evidence therein, as a witness for his client, is dangerous, indecent and reprehensible.* When counsel are put upon the stand as witnesses, their conduct becomes liable to animadversion, and the profession may thus be brought into contempt.

It was a rule of the Roman law, that judges should take care that advocates be not allowed as witnesses: *Mandatis cavetur, ut præsides attendant, ne patroni in causa, cui patrocinium præstiterunt, testimonium dicant.* Dig. 22, 5, 25. The reason, as professor Greenleaf remarks, was, that the Roman law seemed to consider advocates "as not credible, because of the identity of their interest, opinions, and prejudices with those of their clients." 1 Greenl. Ev. § 238, note 2.

In England, the rule is now held to be, that an attorney, who is also acting at the same time as counsel, is not a competent witness. Thus, in the case of *The King* v. *Brice*, 2 Barn. &

* In lord Campbell's Lives of the Chancellors, vol. i. p. 580 – 1, (Am. ed. 436,) referred to by the counsel for defendants, the following passage occurs in the account of the trial of sir Thomas More: —

"The jury, biased as they were, seeing that if they credited all the evidence, there was not the shadow of a case against the prisoner, were about to acquit him; the judges were in dismay; the attorney-general stood aghast; when Mr. Solicitor, to his eternal disgrace, and to the eternal disgrace of the court who permitted such an outrage on decency, left the bar, and presented himself as a witness for the crown. Being sworn, he detailed the confidential conversation he had had with the prisoner in the Tower, on the occasion of the removal of the books."

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Ald. 606, it was held, that in a criminal case, the prosecutor could not be permitted as an advocate to state the case for the prosecution to the jury, and then as a witness give evidence of facts; and, in giving his judgment in the cause, Bayley, J., referred to a case, in which lord Ellenborough had allowed a prosecutor, who had been a witness before the grand jury on an indictment, to address the jury (on his waiving the giving evidence at the trial); but, afterwards, on being spoken to by the other judges on the subject, he expressed his conviction that he had done wrong, and that the prosecutor had no right to address the jury.

In the case of *Stones* v. *Byron*, 1 Bail Court Reports, 248, decided in 1846, it appeared, that at the trial of the cause before the under sheriff of Middlesex, several witnesses were called on the part of the defendant, who were cross examined by Thompson, an attorney, who conducted the plaintiff's case; that when the defendant's case had been concluded, Thompson addressed the jury upon the evidence, (commenting upon its improbability), and stated that he should tender himself as a witness, to disprove the statement of one of the principal witnesses for the defendant; that this course was objected to by the counsel for the defendant, but his objection was overruled by the under sheriff, and Thompson was accordingly sworn and gave his evidence in the cause. The jury found a verdict for the plaintiff, and the defendant obtained a rule to show cause why a new trial should not be granted on three grounds, one of which was the admission of the attorney to testify as above stated. The case was argued before Patteson, J., one of the judges of the queen's bench, who made the rule absolute, saying: "I would rather decide this case on the broad ground, that the attorney for the plaintiff has behaved improperly in the course he has taken in acting as advocate and witness in the same cause. I think that where a party makes a speech to the jury stating his case, cross examines the witnesses called on the other side, makes a speech in reply, and then tenders himself as a witness he ought not to be heard."

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In a subsequent case in the same court, that of *Dunn* v. *Packington*, decided in 1847, 1 Bail Court Reports, 312, a rule was obtained by the defendant to show cause why there should not be a new trial, on the ground, that the attorney, who had conducted the cause for the plaintiff before the under sheriff, had acted in the double capacity of advocate and witness, in stating the case to the jury and then tendering himself and being examined as a witness. The counsel for the plaintiff endeavored to distinguish this case from that of *Stones* v. *Byron*, on the ground, that here the attorney had merely stated the case to the jury, and had then given evidence; he had not cross examined the witnesses called on the other side, nor made a speech in reply, prior to giving evidence, as in the case cited. But Erle, J., said: "I quite concur in the judgment of my brother Patteson, in that case, and think that a jury ought not to be put to consider testimony given by a witness, after having just heard a speech from him as advocate in the cause. This principle was acted on by the late lord Tenterden, and I think it is sound."

If a similar abuse has grown up here, it is not too late to revise the practice, and to establish a new and more beneficial rule.

R. A. Chapman, for the plaintiff. It might be convenient, in some cases, and perhaps desirable, if the law could be altered in this respect. On the trial of the case of *Chapin* v. *Lapham*, 20 Pick. 467, in which the counsel was not only called as a witness, but compelled by the court to examine his minutes of the testimony given on a former occasion, in order to refresh his recollection, it would have been agreeable to the counsel, if the rule had been as it is now stated to be by the defendants' counsel.

The law on this point, in England, had always been supposed to be settled, and that there was no limitation to the competency of counsel as witnesses, except as to confidential communications; and the fact, that no case is to be found, until the decisions referred to by the counsel for the defendants, in which the general competency of counsel as

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witnesses has been questioned, indicates the unanimous opinion of the profession down to that period.

In this commonwealth, it has long been the usage to call the counsel in a cause as witnesses, and no objection has ever been made to their competency. But though the point has not received a judicial decision, there are several cases which imply that such is the rule. *Caldwell* v. *Lovett*, 13 Mass. 422; *Chadwick* v. *Upton*, 3 Pick. 442; *Chapin* v. *Lapham*, 20 Pick. 467. Since the cases of *Utley* v. *Merrick*, 11 Met. 302, and *Comm'th* v. *Churchill*, 11 Met. 538, it is hardly to be supposed, that the principle of exclusion is likely to be extended in this commonwealth, any more than in England. In New York, the attorney in a cause is a competent witness. *Yordan* v. *Hess*, 13 Johns. 492; *Chaffee* v. *Thomas*, 7 Cow. 358. So in Pennsylvania. *Newman* v. *Bradley*, 1 Dall. 240; *Miles* v. *O'Hara*, 1 S. & R. 32. In Louisiana, the attorney of record is excluded by statute.

The exclusion contended for is not required on any ground of principle; and very great inconvenience would doubtless result from holding the counsel of a party incompetent, as a witness, under all circumstances. If a change is to be made, it should be effected by a well considered and guardedly framed statute. The counsel has been obliged to go to the Roman law for authority. The fact, that professor Greenleaf also refers to the rule of the Roman law, but without stating it to be the same in the common law, is very significant.

Metcalf, J. The only question that has been argued in this case is, whether the plaintiff's attorney, who acted as counsel at the trial, was a competent witness for his client; and we know of no common law authority for excluding his testimony, besides the two very recent decisions in the English bail court, which were cited by the counsel for the defendants. By what authority the judges, sitting in that court, made those decisions, we do not know; whether by virtue of the rules which the judges of the three chief courts of law in England are empowered, by recent statutes, to make for the uniform regulation of practice in all those courts, or by

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virtue of the superintending control which those courts exercise over their own officers. See Smith on Actions at Law, 11, 24. Whatever that authority may have been, we have no such authority. We cannot exclude a witness by reason of any views which we may entertain respecting the policy of permitting him to testify. We can only administer the law as we find it to be. And by the common law, persons are competent witnesses, unless they are made incompetent by want of capacity, or of religious faith, by infamy, or by direct interest in the result of the cause. Witnesses are every day permitted to testify, whose wishes for the success of the party who calls them are as strong as those of the party's attorney or counsel. And until the long established rules of evidence are changed by legislative enactment, we cannot exclude a witness, merely because his testimony is to be given in behalf of his client. Whenever, except in the bail court, attorneys and counsel have been rejected as witnesses, it has been on the same ground on which others are excluded; namely, direct interest in the event of the suit, &c. See *Chaffee* v. *Thomas*, 7 Cow. 358; *Newman* v. *Bradley*, 1 Dall. 240; *Miles* v. *O'Hara*, 1 S. & R. 32; *Geisse* v. *Dobson*, 3 Whart. 34; *Slocum* v. *Newby*, 1 Murph. 423; *Reid* v. *Colcock*, 1 Nott & McCord, 592; *Chadwick* v. *Upton*, 3 Pick. 442; *Jones* v. *Savage*, 6 Wend. 658; *Comm'th* v. *Moore*, 5 J. J. Marsh. 655; *Brandigree* v. *Hale*, 13 Johns. 125.* In the present case, the objection to the witness was, not that he was interested, or that he was in any way incompetent, except as attorney and counsel for the plaintiff.

In most cases, counsel cannot testify for their clients without subjecting themselves to just reprehension. But there may be cases in which they can do it, not only without dishonor, but in which it is their duty to do it. Such cases, however, are rare; and whenever they occur, they necessarily cause great pain to counsel of the right spirit.

Exceptions overruled.

* See also *Robinson* v. *Dauchy*, 3 Barb. Rep. 20; *Little* v. *McKeon*, 1 Sandf. 607

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Ephraim Arnold *vs.* Chandler Sabin.

The next of kin of one deceased intestate suffered thirty days to elapse after his death, without taking any measures to obtain administration of his estate: A creditor of the intestate then applied, by petition, to the judge of probate, to be appointed administrator, and the judge ordered public notice to be given (which was done) to all persons interested in the estate of the intestate, to appear and show cause why the prayer of the petition should not be granted: At the time and place appointed by the notice, the father of the intestate appeared, for the purpose of objecting to the petition, and being inquired of by the judge, whether he wished to take the administration, replied that he would have nothing to do with it: The judge of probate thereupon proceeded, and granted administration to the petitioner, and the father appealed: It was held, that the declaration of the appellant, not being recorded, was not an effectual renunciation, and that such public notice, especially as the appellant had actual notice and appeared, was sufficient.

The demand of a creditor, applying for administration of the estate of an intestate, under the Rev. Sts. *c.* 64, § 4, *cl.* 2, on the neglect or refusal of the next of kin, may be proved by his book of accounts and suppletory oath.

This was an appeal from a decree of the judge of probate, appointing the appellee administrator of the estate of Arba Arnold.

It appeared, that Arba Arnold, of Belchertown, died about two years before the commencement of these proceedings in the probate court, intestate, leaving no widow or lineal descendant; and that on the second Tuesday of May, 1847, the appellee was appointed administrator, on the ground, as set forth in his petition, that the intestate left estate of which administration was necessary, and that the appellee was a creditor, and as such entitled to the administration.

The reasons of appeal were:

1. That the intestate left no widow or lineal descendant; that the appellant was his father, and had not voluntarily taken or renounced the administration; and that living within the county, he had never been cited by the judge for that purpose.

2. That the appellee was not, in fact, a creditor of the intestate.

On the hearing in this court, before *Dewey*, J., it appeared, in reference to the *first* reason, that no citation was issued and served on the appellant, and that the only notice ever

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given to him, of the pendency of the appellee's petition, was a general public notice, to all persons interested in the estate of the intestate, to appear and show cause, &c.

It appeared, also, by the testimony of the judge of probate, that, at the time when the appellee was appointed, the appellant was present, and was inquired of by the judge whether he wished to take the administration; to which the appellant replied, that he would have nothing to do with it, or in words to that effect.

The appellant contended, that the notice was not sufficient; but that there should have been a citation issued and directed to and served upon him, stating the time and place, when and where the petition of the appellee was to be acted upon; and that he was not barred from prosecuting his appeal, by reason of any act or declaration made by him to the judge of probate; he not having made any written renunciation of his right to administer upon the estate of his deceased son.

The judge ruled, that after the general public notice in the newspaper, and the acts and declarations of the appellant, as testified to by the judge of probate, the appellee, as a creditor, might properly be appointed administrator.

As to the *second* reason of appeal, namely, that the appellee was not in fact a creditor of the intestate, the appellee produced his book of accounts, and made oath to a charge therein, against the intestate, of fifty-eight cents, for repair of a wagon. The appellee testified further, that the entry of this charge on his book was an original entry, made at the time of its date; that he presumed, though he could not say, that it was first put upon a slate; that he was in the practice of making entries on a slate, but could not swear that he made this entry; that if he himself did not make it, it was made by one Smith, who worked for him at the time; and that when he returned home, after being absent, and found charges on the slate, he transferred them to his book.

The appellant objected to the competency of this evidence to prove that the appellee was a creditor of the intestate. But the judge overruled the objection, received the evidence as

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competent, and decided that it was sufficient to prove that the appellee was a creditor of the intestate, to the amount of the charge of fifty-eight cents.

The judge thereupon affirmed the decree of the probate court, appointing the appellee administrator of the estate of Arba Arnold, and the appellant filed exceptions.

E. G. Bowdoin, for the appellant. 1. The acts and declarations of one, who is entitled by law, as the appellant was, (Rev. Sts. *c.* 64, § 4, *cl.* 2,) to the administration, are not equivalent to a renunciation, which cannot be effected by an act *in pais*, but only by some instrument in writing, duly entered and recorded. Bac. Abr. Executor, &c.; *Stebbins* v. *Lathrop*, 4 Pick. 33, 44; *Chase* v. *Hathaway*, 14 Mass. 222; Rev. Sts. *c.* 83, § 7; White Prob. Courts, 47. The process should have been a citation in the usual form. *Cobb* v. *Newcomb*, 19 Pick. 336; Rev. Sts. *c.* 65, § 7; *c.* 93, §§ 3, 4, 5; *c.* 109, § 64; *c.* 79, § 2; *c.* 63, § 7; *c.* 67, § 9. The insolvent acts, generally, contain similar provisions as to citation.

2. The testimony of the appellee was inadmissible. Smith's was the better evidence, and he should have been called.

C. Delano & I. F. Conkey, for the appellee.

1. The statute (Rev. Sts. *c.* 64, § 4) does not, in terms, require that the renunciation should be in writing; what took place in the probate court was sufficient. If a citation were necessary, then each of the next of kin must be cited. But the want of notice, whatever its effect, was waived by the appearance of the appellant. *Fox* v. *Hazelton*, 10 Pick. 275, *Simonds* v. *Parker*, 1 Met. 508. In this case, there was not only an appearance, but an express declaration by the appellant, that he would have nothing to do with the administration. The first clause of § 4, above cited, gives the right of administration to the next of kin; the second gives it to the creditors, when the next of kin refuse or decline; and when the thirty days limited in the latter, for the next of kin to assume the trust, have expired, they stand on no better footing than creditors. The point is settled, at least, impliedly, in the case of *Cobb* v. *Newcomb*, 19 Pick. 336.

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2. The evidence of the appellee was competent, and was properly admitted. 1 Greenl. Ev. § 118.

E. Dickinson replied.

FORBES, J. In this case two objections are made to the decision of the learned judge who heard the appeal.

1. That the notice was insufficient, inasmuch as no citation was issued and served upon the appellant personally, previously to the appointment of an administrator by the judge of probate.

The Rev. Sts. *c.* 64, § 4, provide that administration shall be granted:

"First, to the widow or next of kin, or both, as the judge of probate shall think fit; and if they do not voluntarily either take or renounce the administration, they shall, if resident within the county, be cited by the judge for that purpose.

"Secondly, if the persons so entitled to administration are incompetent, or evidently unsuitable for the discharge of the trust, or if they shall neglect, without any sufficient cause, for thirty days after the death of the intestate, to take administration of his estate, the judge of probate shall commit it to one or more of the principal creditors, if there be any competent or willing to undertake the trust."

In the present case, the next of kin had neglected, for more than thirty days after the death of the intestate, to take administration on his estate, and it was contended, that under these circumstances, no citation was necessary. Upon a literal construction of the second paragraph above cited, this position would seem to be sustained; and yet its correctness may be doubted. The first paragraph contains a general direction that the widow, and next of kin, shall be cited, if resident within the county; and by the statute of 1817, *c.* 190, § 14, it was provided, that after the expiration of thirty days from the death of the person intestate, in case the widow or next of kin should refuse or neglect to take out letters of administration, ***being cited before the judge of probate for that purpose***, if resident within the county, the judge might

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commit administration to some one or more of the principal creditors. It does not appear from the notes of the commissioners upon the revised statutes, that, in this respect, any change in the law was intended, and the apparent change may have arisen from a desire to render the language of the code more concise than was the language of the statute revised.

It was also contended, that in the proceedings before the judge of probate, the appellant renounced the administration. If a record had been made of the declaration of the appellant to the judge, it might have been an effectual renunciation, but in the absence of a record, it cannot have that effect.

The question then recurs, whether the public notice, which was ordered by the judge, and given to all persons interested in the estate, was a citation within the meaning of the statute. And we are of opinion that it was; especially, as the appellant had actual notice and did appear before the judge of probate to interpose objections against the granting of the prayer of the petition. In England the term "citation" is applied particularly to process in the spiritual courts; as the ecclesiastical courts, there, proceed by libel and citation, according to the course of the civil and canon law. In this country it has been defined "an official call or notice to appear in court;" and as a general rule, it is issued, and served upon a particular individual, who is thereby made a party to the proceedings. This is so in the case of citations to minors, to the creditors of poor debtors, to trustees, executors and administrators, and to persons who have fraudulently concealed or embezzled the estate of insolvent debtors, and in other instances. In these cases, the intention of the legislature is apparent from the objects which it had in view, and from the ends which it designed to accomplish. But there is another class of cases in which a direct personal notice is difficult, if not impracticable, and which may furnish an analogy to the present case. In proceedings *in rem* in courts of admiralty, the owners of the property libelled are not necessarily sought out, and served with personal notice. A monition is issued.

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or, in other words, a general notice to all persons interested to appear and vindicate their claims; and all persons, who are interested, have a right to appear and become parties to the proceedings. In these, and in similar proceedings, it is not impossible, perhaps, for the libellant to ascertain who the person really interested is, but in many cases it is extremely difficult, even when resident within the jurisdiction of the court. The libellant is not presumed to be cognizant of the title of any particular individual, or class of persons. If the supposed owner were summoned, it might appear that he had no title, or if a *prima facie* title were shown, it might subsequently appear that others, not notified, had a better title; and, therefore, to prevent unnecessary delay and expense, a general notice is resorted to.

The like reasons, we think, apply in the present case. If a personal notice were held to be necessary, it would, in many cases, be difficult to ascertain upon whom the notice must be served. If the supposed widow of the intestate were summoned, and administration were committed to her, it might be true that there was never a legal marriage, and that the appointment was invalid. Difficulties might arise in ascertaining who were next of kin, each of whom would be entitled to a personal notice; and the proceedings would be, necessarily, attended with uncertainty, doubt and delay. Those who live within the county are generally well informed of the decease of an intestate, in the administration of whose estate they are interested; and they understand the usual course of proceedings in the settlement of intestate estates. This knowledge is sufficient, at least, to put them upon inquiry. And, practically, there can be but little danger that these interests will be compromised, by holding a general notice to be sufficient. Upon such notice, all who pretend to a right to administer may appear, their claims may be considered, and decided with very little expense or delay. The statute, in this as in other cases, must receive a reasonable construction; it does not define the manner in which the citation is to be made, but leaves that to the court, with no

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other restriction, than that it shall be made in such a manner as will best accomplish the purpose for which the citation is directed. We believe, that in this respect the judge conformed to the practice of the courts of probate throughout the state, and in our opinion the practice is warranted by a reasonable construction of the statute.

2. The second objection is, that the evidence of the indebtedness of the intestate to the appellee was insufficient and ought to have been rejected.

We are of opinion that this objection ought not to prevail. The evidence offered by the appellee to prove his debt against the estate was clearly competent. This kind of evidence is, no doubt, liable to abuse, but its admissibility is too well established to be called in question. The witness testified that the charge on his books was the original entry, and that it was made at its date; that he presumed that he put this charge on the slate, from which it was transferred to his book of original entries. It is immaterial whether the charge was first made on the slate or not. *Faxon* v. *Hollis*, 13 Mass. 428; *Smith* v. *Sanford*, 12 Pick. 139. The residue of his statement might impair the confidence which the judge reposed in the evidence, but did not, we think, render it incompetent.

The exceptions are overruled and the case remitted to the judge of probate, in order that he may proceed in the settlement of the estate.

Oliver Judd & others *vs.* Myron Lawrence & another.

An alien, resident within the commonwealth, is entitled to the benefit of the insolvent laws.

This was a petition of certain creditors of Arthur Sowerby, an inhabitant of Northampton, setting forth, that, on an application made by him to the commissioner of insolvency, for the benefit of the insolvent laws, a warrant had been issued

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and a meeting of creditors held, and praying that all further proceedings therein might be stayed, on the ground that Sowerby was an alien, and therefore not within the provisions of the several acts relating to insolvent debtors.

The alienage of Sowerby being admitted, the only question submitted to the court was, whether the insolvent laws extended to and embraced the case of aliens.

C. P. Huntington, for the petitioners.

1. It does not follow, that, because aliens may be considered as included within the general terms of the *St.* 1838, *c.* 163, § 1, "any debtor," &c., they are therefore within its provisions. They must also be clearly within the meaning and intention. *Claflin* v. *Beach*, 4 Met. 392. Corporations are within the terms, but not the meaning, and so not subject to the provisions, of the insolvent laws. *Comm'th* v. *Phœnix Bank*, 11 Met. 129, 150. The words "inhabitants" and "residents," though broad enough to include aliens, may nevertheless be restrained, if the subject matter require it, to such inhabitants or residents as are also citizens. *Opinion*, &c., 7 Mass. 523, 525. The widow of an alien is not entitled to dower; *Sewall* v. *Lee*, 9 Mass. 363; nor can an alien husband be tenant by the curtesy; *Foss* v. *Crisp*, 20 Pick. 121, 125; yet the provisions of the statutes relating to dower and curtesy are broad enough to include aliens.

2. The authority, conferred on the commissioner to assign all the property of the debtor, both real and personal, which the debtor himself "could by any way or means have lawfully sold, assigned or conveyed," shows that the insolvent laws were not intended to apply to aliens, who can neither hold, nor make any valid or effectual conveyance of, real estate. *Scanlan* v. *Wright*, 13 Pick. 523; *Slater* v. *Nason*, 15 Pick. 345, 349; *Wilbur* v. *Tobey*, 16 Pick. 177. Hence, if aliens should be considered as within the insolvent laws, the proceedings in many cases must necessarily be partial and imperfect, inasmuch as they cannot affect or operate upon the real estate of the debtor. There would thus also be two insolvent systems established; one for citizens, by which all

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the property of the debtor, both real and personal, would be appropriated to the payment of his debts; and the other for aliens, by which creditors could only resort to the personal estate of their debtor.

3. There is no constitutional power in a state to discharge the debts of aliens by means of an insolvent law. 1 Kent, (5th ed.), 422; 2 Same, 396; Story, Confl. §§ 340, 543; *Springer* v. *Foster*, 2 Story R. 383; *Betts* v. *Bagley*, 12 Pick. 572; *Agnew* v. *Platt*, 15 Pick. 417; *Bigelow* v. *Pritchard*, 21 Pick. 169; *Towne* v. *Smith*, 9 Law Reporter, 12; *Watson* v. *Bourne*, 10 Mass. 337. The constitution of the United States gives jurisdiction of cases, to which aliens are parties, to the courts of the United States; but there is no authority in the courts to dissolve attachments according to the *St.* of 1838, *c.* 163, § 20.

R. A. Chapman & E. Dickinson, for the respondents, argued, that the language of the several statutes, relating to insolvency, were broad and general enough to include aliens, and that there was nothing in the subject matter which rendered it necessary or proper that they should be excluded. It is the policy of our law to withhold political privileges from aliens, and to prevent them from becoming the owners of the soil; but they are nevertheless allowed to acquire and enjoy all civil and municipal rights, which are not inconsistent with this policy. Thus, so far as their personal contracts and liabilities are concerned, aliens stand upon the footing of citizens. *Barrell* v. *Benjamin*, 15 Mass. 354, 358.

The objection, that the real estate of an alien insolvent cannot be affected by the proceedings, is one which the petitioners, who are attaching creditors, cannot make against the respondents, who represent creditors equally entitled with them to the benefit of the insolvent's estate. But the objection itself is not well founded, inasmuch as the assignee may well take the real estate, subject to the claim of the commonwealth.

The limitation upon the power of the states is, that they cannot pass insolvent laws which shall be binding on persons

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not within their jurisdiction; but as to persons within their jurisdiction, there is no distinction between aliens and others. Laws may be passed by the several states, to protect the rights of aliens, with respect to contracts entered into by them; and, by the same rule, the states may pass laws to discharge aliens, as well as citizens, and in the same manner, and to the same extent, from the obligation of their contracts.

Wilde, J. This case comes before us on a petition to stay proceedings before the commissioner of insolvency in this county; on the ground that the commissioner has no jurisdiction in the case stated in the petition and admitted by the answer of the respondents.

Arthur Sowerby, who made application to the commissioner, to take the benefit of the insolvent laws, was an alien residing in Northampton, in this county; and, it is contended on the part of the petitioners, that the insolvent laws do not extend to aliens, and were not so intended by the legislature; and that if they are to be so construed, they are void by the constitution of the United States, being laws impairing the obligation of contracts.

As to the first point, the insolvent laws (*St.* 1838, *c.* 163, and acts in addition thereto) extend in terms to all insolvent debtors, residing within this commonwealth; and this language unquestionably embraces aliens as well as native or naturalized citizens, unless it can be shown that such was not the intention of the legislature. It has been argued, that this appears by the authority given to the commissioner to assign all the debtor's estate, real and personal, whereas an alien cannot hold or effectually assign real estate. But, if this were so, there seems to be no reason why the personal estate of an alien insolvent debtor should not be distributed among his creditors under the insolvent laws, as well as the personal estate of native citizens who have no real estate. But it is not true, that aliens cannot hold and assign real estate. It is true, an alien cannot take by descent, but he may take by purchase or devise, and can hold against all except the commonwealth, and can be divested only by office found,

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and, until office found, can convey. *Sheaffe* v. *O'Neil*, 1 Mass. 256; *Storer* v. *Batson*, 8 Mass. 431; *Fox* v. *Southack*, 12 Mass. 143. And whatever title the insolvent debtor could convey by deed may be assigned by the statute.

It was argued, that the courts of the United States have jurisdiction when an alien is a party, and that an attachment made by virtue of a writ from those courts cannot be dissolved, as is provided by the insolvent law of 1838, *c.* 163, § 20. But this objection would apply to an attachment of the property of a native citizen, as well as to that of an alien. We have no doubt, therefore, that an alien insolvent debtor is entitled to the benefit of the insolvent laws, and that he may be proceeded against by his creditors, in the same manner as they may do against a native citizen. The language of the statute extends to both, and there is no reason for any distinction between them.

As to the objection, that these insolvent laws are repugnant to the constitution of the United States, we are of opinion, that it is not sustained by the cases and authorities cited. When it is said, in some of these authorities, that no state can pass an insolvent law, except so far as regards its own citizens, and that foreign creditors, and creditors in other states, cannot be barred, while state creditors may be, it was not intended by the use of the word "citizens" to exclude aliens; an inhabitant may be termed a citizen, and there is no reason to suppose that the word was used in any other sense.

Such a law, extending only to native or naturalized citizens, would as much impair the obligation of contracts, as a law extending also to aliens. We think, therefore, that these insolvent laws are valid, and that the commissioner of insolvency has jurisdiction, and is authorized to proceed in the case stated.

Petition dismissed.

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EDWARD A. STANLEY, Administrator, *vs.* WILLIAM GAYLORD.

If the bailee of a chattel, who has no authority, as against the bailor, to retain or dispose of it, mortgage it as a security for his own debt, and the mortgagee take possession under the mortgage, the bailor may maintain an action of trespass therefor against him. WILDE, J., dissenting.

THIS was an action of trespass, for taking and driving away a cow belonging to the plaintiff's intestate, Fanny Thayer, in her lifetime. The case was tried in the court of common pleas, before *Washburn*, J., and came before this court upon exceptions there taken by the defendant, against whom a verdict was rendered, to the rulings and instructions of the judge.

The bill of exceptions stated as follows:

The plaintiff, to sustain his action, called Henry J. Franklin, from whom it appeared in evidence, that Mrs. Thayer, the plaintiff's intestate, lived in Springfield, and the witness in Amherst; that, in the fall of the year 1840, an exchange was made by the witness and Mrs. Thayer, at Springfield, of a cow then belonging to her and in the possession of Franklin, for the cow, which is the subject of the present suit, and which was then also in the possession of the witness, Franklin, at Amherst.

Whether there was or was not an actual delivery to Mrs. Thayer, before the making of a paper, by which Franklin undertook to mortgage the cow to the defendant, was a point in controversy, upon which the jury did not return a special finding.

The defendant relied, in defence, upon the paper or mortgage above mentioned, which was executed in February or March, 1842, for the purpose of securing a *bona fide* debt due from Franklin to the defendant, and under which the latter claimed and took possession of the cow, on the 20th of October, 1842.

There was evidence, that, after the exchange, the cow in question remained upon Franklin's farm; but whether in

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pursuance of any contract, and, if so, what were the terms of such contract, was a matter in dispute.

The defendant contended, that even if the cow belonged to the intestate, yet, being in the possession of Franklin, when the mortgage was made, and the defendant not having notice of such ownership by the intestate, this action of trespass could not be maintained against him, and requested the judge to instruct the jury accordingly.

The judge declined so to instruct the jury, but instructed them, "that if the cow belonged to the intestate by a title which had been consummated by a delivery, and was upon the farm of Franklin, as a keeper for the intestate, or by the favor and indulgence of the intestate, without any authority to hold possession of her as against the intestate, or to dispose of her, the defendant could not justify the taking, by virtue of the mortgage, and that the plaintiff could maintain trespass for such taking, although done without notice of the ownership of the intestate."

The jury returned a verdict for the plaintiff, and the defendant filed exceptions.

C. P. Huntington, for the defendant.

The facts show, that the taking by Gaylord was lawful or excusable, under a claim of right, and in virtue of a mortgage given to secure a debt due from Franklin, the bailee, who was in actual possession, claiming ownership and a disposing power.

The taking was lawful or excusable, and, in either case, trespass cannot be maintained. There was no previous demand of Gaylord; nor was there any notice to him, or any knowledge on his part of any other claimant.

On the former hearing of this case, 10 Met. 82, there was an intimation given by the court, that trespass would not lie, and that an amendment should be moved for. See the authorities cited by Hubbard, J., at p. 84, and also *Boise* v. *Knox*, 10 Met. 40, 44; *Salisbury* v. *Gourgas*, 10 Met. 442, 448; *Leonard* v. *Tidd*, 3 Met. 6. In the last case, at p. 8, the court speak of the defendant's "restoring" the property,

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but the facts do not so find. In 2 Greenl. Ev. § 642, it is said, that "a mere purchase of goods, in good faith, from one who had no right to sell them, is not a conversion of them, against the lawful owner, until his title has been made known and resisted."

Where one obtains possession of goods, in good faith, by the delivery or consent of the party in possession, the owner cannot maintain trespass. *Marshall* v. *Davis*, 1 Wend. 109; *Nash* v. *Mosher*, 19 Wend. 431; *Root* v. *French*, 13 Wend. 570; 3 Steph. N. P. 2695, and cases there cited, note 45; 2 Wms. Saund. 47 *a*, *b*, *c*; 1 Chit. Pl. 155, 156, 170; Com. Dig. Trespass, D; Bac. Ab. Trespass, C, 2; Trover, C; Bro. Ab. Trespass, 216, 295, recognized in *Hunt* v. *Holton*, 13 Pick. 216, 220; Viner, Trespass, M. 11.

In the cases relied on by the plaintiff, the defendant was a wrong-doer, invading the rights of a bailee, or taking the thing against his consent; and they tend to show, that trespass might be maintained against Franklin, as a wrong-doer, rather than against Gaylord, an innocent mortgagee or purchaser.

In the present case, there was a mere taking of possession, under a claim of right, by leave of one having the lawful custody, and claiming to be the owner; there was no conversion, no destruction, no abuse, no wrongful act, and, of course, no trespass.

If A should go to the keeper of a livery stable, who had B's horse to keep, and innocently purchase the horse, — the stable-keeper holding himself out as the owner, — could A be liable for taking the horse away, until after demand and conversion?

C. Delano, for the plaintiff.

The bill of exceptions shows, that there was a valid exchange, in 1840, consummated by a delivery to the plaintiff's intestate; that Franklin continued in possession, afterwards, as her gratuitous bailee, by special indulgence and favor, down to the time of the alleged trespass; that Franklin had no authority to sell or dispose of the cow, but that Mrs.

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Thayer had a present right, at any time, to reclaim her; and that the cow was taken possession of by the defendant, who claimed to hold her as mortgagee.

Assuming these to be the facts, it is clear, that from the moment of the delivery, Mrs. Thayer had a constructive possession, for the violation of which trespass will lie. Bac. Ab. Trespass, C, 2; *Walcot* v. *Pomeroy*, 2 Pick. 121.

But the objection is, not to the sufficiency of Mrs. Thayer's possession, but that the taking by the defendant was not tortious, or, in other words, that no action can be maintained against him, until after a demand and refusal.

The position of the plaintiff is, that the taking itself was tortious, in the sense of the law, so that no demand was necessary.

1. This is clear upon authority.

In order to maintain trespass, it is not necessary to prove actual force in the taking; force enough to do the act, and to acquire the possession against right, and without the consent of the owner, is sufficient. *Sec. Cong. Soc. in N. B.* v. *Howard*, 16 Pick. 206.

A demand is often necessary in trover, where the original taking is not tortious, in order to prove a conversion; but not where the taking is tortious. *Boise* v. *Knox*, 10 Met. 40.

So, replevin lies for a tortious taking, without a demand, and for a wrongful conversion after a demand. *Badger* v. *Phinney*, 15 Mass. 359.

Authorities, then, which show that trespass may be sustained upon facts like the present, or that upon the same facts, either trover or replevin may be maintained, without a previous demand, are in point.

In Bac. Ab. Trespass, E, 2, it is said:

"If the bailee of goods give or sell them to J. N. but do not deliver them, and J. N. take them, an action of trespass lies; because, as the gift or sale of a person, who had only a special property in the goods, did not transfer a property to J. N., his possession of the goods was tortiously obtained."

The case here supposed is precisely the case at bar;

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inasmuch as there never was any delivery of possession by Franklin to Gaylord; and, if that were the turning point, the authority would be decisive against the present action. But the delivery is not the material element; for, in the next case but one put by Bacon, a delivery is one of the facts supposed:

"If a servant, who has only the custody of his master's goods, give or sell them to J. N. and deliver them, and J. N. carry them away, this action lies; because, as the servant had no power to transfer a property in the goods, the possession by J. N. was tortiously obtained."

The reason given, why, in both cases, the possession was regarded as tortiously obtained by J. N., is, because the bailee and the servant had no power to transfer the property; and that the whole question, under the old law, turned on the bailee's "power to transfer a property," is further evident from another case stated by Bacon:

"A servant, who is empowered to sell the goods of his master, gives them to J. N. and delivers them, and J. N. carries them away, here trespass does not lie; because, as a power to sell implies a power to transfer a property in them, the possession by J. N. was lawfully obtained."

In all these cases, the material consideration was, whether or not there was an authority in the bailee, either express or implied, to transfer a property to a stranger.

Archbold, N. P. (2d ed.) 478, lays down the same doctrine, contained in the first and second of the passages just quoted from Bacon, in nearly the same terms.

The case of the *Sec. Cong. Soc. in N. B.* v. *Howard*, 16 Pick. 206, was an action of trespass, in which the law applied might be stated in the precise terms of the second citation from Bacon. In this case, indeed, there was a demand; but, as the action was trespass, and was sustained, the taking must have been tortious, and the demand, of course, superfluous.

In the case of *Hyde* v. *Noble*, 13 N. H. 494, the plaintiff was the owner of a part of a cargo, which the master had sold,—both he and the purchaser supposing that the former

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had authority to sell, — and the action was brought and maintained against the purchaser, without a demand; the court saying expressly, that a demand and refusal were not necessary. The reason must have been, that the mere acquisition by the purchaser from the master, who had no authority to sell, was in itself tortious.

The case of *Galvin* v. *Bacon*, 2 Fairf. 28, which was an action of replevin, was evidently decided upon the same ground, namely, that the act of an agent or bailee, in selling property which he has no authority to dispose of, is technically tortious. In that case, the plaintiff, being the owner of a horse, bailed him to A for use, for a limited period, under the expectation of a purchase by the latter. During the bailment, A, for a valuable consideration, and without notice, sold the horse to B, who, in like manner, sold him to the defendant. It was held, that the owner might maintain replevin against the last purchaser, without a demand.

2. It is contended, also, that upon the analogies of the law, this action may be maintained.

The cases, already mentioned, of trover and trespass, show that upon facts very analogous to those of the present case, actions may be maintained without a previous demand.

There are other cases, too, equally analogous, where trespass has been maintained against a sheriff or a creditor, attaching in good faith goods in the possession of a debtor, and apparently owned by him, when, in fact, they were owned by a third person, and only in the custody of the debtor as bailee. *Walcot* v. *Pomeroy*, 2 Pick. 121, and *Holly* v. *Huggeford*, 8 Pick. 73, are examples of this class of cases.

It is no answer to the argument drawn from these cases to say, that the officer or creditor is to justify under his precept, which only commands him to take the property of the debtor. The question is not, whether the officer, or attaching creditor, or a *bona fide* purchaser, acquires any property, by the attachment or purchase, (in both cases, it must be conceded, he cannot,) but whether the apparent ownership in the bailee in

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the one case any more than in the other, entitles the party taking the property to a demand before suit.

If the present action cannot be maintained, this inconsistency will follow. If Gaylord, instead of taking a mortgage, had attached the cow, as a security for his debt, he would have been liable in trespass; while, in the present state of facts, though he acquired the possession of the cow no more innocently, and in no better faith, this and every other action must miscarry, until after a demand.

The opinion of a majority of the court was delivered by Metcalf, J.* Under the instructions given to the jury, upon the evidence submitted to them, their verdict has established these facts; viz., that the cow in question belonged to the plaintiff's intestate, by a title consummated by delivery, and was in the possession of Franklin, without any authority in him, as against the intestate, to retain or dispose of her; and that the defendant took her, claiming her under a mortgage made to him by Franklin after the intestate's title was consummated. And the question is, whether the jury were rightly instructed that the plaintiff could maintain trespass for such taking, although the defendant had no notice that the intestate owned the cow.

The evidence showed that the taking was in the lifetime of the intestate; and if she could have maintained an action of trespass, the plaintiff may maintain the like action. *Emerson* v. *Emerson*, 1 Vent. 187; 1 Saund. 217, note; Rev. Sts. c. 93, §§ 7, 8.

This preliminary point has not been contested by the defendant's counsel. But he contends that one who, in good faith, obtains possession of chattels, by delivery or consent of a party in possession, is not liable to an action of trespass by the true owner; the taking, in such case, being lawful or excusable. This position is denied by the plaintiff's counsel; and various authorities have been referred to, which are now to be considered.

* *Forbes*, J., did not sit in this case.

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In Bac. Ab. Trespass, C, 2, and E, 2, some distinctions are laid down, which are taken from Brooke's Abridgment, where the year books are cited. Thus: "If a servant, who is empowered to sell the goods of his master, give them to J. N., and deliver them, and J. N. carry them away, an action of trespass does not lie; because, as the power to sell goods implies a power to transfer a property in them, the possession of the goods by J. N. was lawfully obtained. But if a servant, who has only the custody of his master's goods, give or sell them to J. N., and deliver them, and J. N. carry them away, this action lies; because, as the servant had no power to transfer a property in the goods, the possession of the goods by J. N. was tortiously obtained." Bro. Ab. Trespass, 295, is cited.

Another passage is cited by Bacon from Bro. Ab. Trespass, 216, which is also found in Fitz. Ab. Trespass, 245, and in 20 Vin. Ab. Trespass, M, 11, taken from the year book 21 H. 7, 39, where it stands thus: "Note. By Fineux, C. J., and Tremaile, J. If I bail goods to a man, and he gives or sells them to a stranger, and the stranger takes them without delivery, he is a trespasser, and I shall have a writ of trespass against him; for by the gift or sale the property was not changed, but by the taking; but if he make delivery of them to the vendee or donee, then I shall not have a writ of trespass."

If these passages are to be taken as settling the distinction between the action of trespass *vi et armis* and other actions, it is clear that the present action is well maintained. For, as the case stands, upon the exceptions, the defendant took the cow without any delivery by Franklin. The evidence shows that the mortgage was made to the defendant in February or March, 1842, "under which he claimed and *took* possession of the cow," in the month of October following; and the judge instructed the jury, that "the defendant could not justify *the taking* by virtue of the mortgage." It does not appear that any evidence was given of a delivery by Franklin, or that any question was made, at the trial, concerning a deliv-

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ery by him. If Franklin was the bailee of the plaintiff's intestate, the taking by the defendant, without delivery, subjected him to an action of trespass by the intestate; and if Franklin was the mere servant of the intestate, the defendant became a trespasser, by taking the cow, even though Franklin had delivered her to him.

But we do not understand that the foregoing distinctions, found in Bacon, were originally made with any reference to the forms of action. In the year books, the words "trespass" and "writ of trespass" are frequently, if not generally, used in their generic sense, including all torts or injuries, whether by violence or otherwise, and the action of trespass upon the case, as well as trespass *vi et armis*. And we suppose the doctrine, cited from Brooke by Bacon, to be merely this; viz., that one, who has only a special property in goods, can transfer the general property, as against the general owner, by a sale or gift accompanied by delivery; so that the general owner cannot reclaim them, nor maintain an action against the vendee or donee, as a wrong-doer in taking them. But that a sale or gift of goods, without delivery, by him who has only a special property therein, does not transfer the general property; so that, if the vendee or donee takes them, he is liable, as a wrong-doer, to the general owner. Thus the matter was understood by serjeant Williams. In his notes to *Wilbraham* v. *Snow*, 2 Saund. 47, he cites Bro. Ab. Trespass, 216, 295, to the following position: "*It is said*, that if the bailee, or other person who has only a special property, sells and *delivers* the goods to another, as his own, *bona fide* and without notice, the general owner cannot maintain *trover or any other action* against the vendee, because by such a sale by a person who has a special property in, and possession in fact of, the goods, the property of the general owner is altered." And more than a hundred years before these notes to Saunders's Reports were published, the doctrine was thus stated in Sheppard's Epitome, 1032, 1033: "If I be a taverner, mercer or draper, and my servant, using to sell my goods, give away my goods, *it is said* I may not

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have this action" (trespass), "*nor any other*, against the taker, but must take my remedy against my servant. Bro. Ab. Trespass, 295. *Sed quære.*" It is to be noticed, that both Sheppard and serjeant Williams refer to a *dictum*, and not to an adjudication, to be found in Brooke, and that Sheppard adds a doubt as to the correctness of the *dictum*. This doubt was well founded. No adjudged case, it is believed, is to be found in the English books, which sustains the doctrine cited by Brooke and others from the year books. And it is now the settled law of England, that the subject of sale must belong to the vendor, and that he can sell no more than the interest which he lawfully has. In the last edition of Saunders, to which additional notes are made by Patteson and E. V. Williams, (now judges in England,) the following passage is subjoined to the note above quoted from serjeant Williams: "However, in modern cases, it has been held, that if a bailee of goods for a particular purpose transfers them to another in contravention of that purpose, the general owner may maintain trover against that person, even although he be a *bona fide* vendee, unless in market overt." The same doctrine is also laid down in Long on Sales, (Rand's ed.) 167; Hilliard on Sales, 28; 2 Kent Com. (6th ed.) 324; *Cooper* v. *Willomatt*, 1 Man. Grang. & Scott, 672; *Roland* v. *Gundy*, 5 Hammond, 202; *Metcalfe* v. *Lumsden*, 1 Car. & Kirw. 309. The law of this commonwealth is like the law of England, on this subject, except as to sales in market overt. Indeed, the defendant's counsel does not deny that such is our law, and does not contend that the defendant acquired any valid title to the cow by virtue of the mortgage from Franklin. But he insists that the plaintiff cannot maintain this action of trespass, but should have brought an action of trover. The question then is, whether the plaintiff could maintain trover in this instance, without first demanding a return of the cow. If he could, then he may maintain trespass; for whenever the taking of goods is wrongful, the taking is a conversion, and trespass, replevin, and trover without a demand, are concurrent remedies for the owner,

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if he has the right of immediate possession. Wilkinson on Replevin, 2; 7 Johns. 143; 1 Chit. Pl. (6th Amer. ed.) 176; 2 Saund. 47 k, note. Any cases, therefore, in which trover or replevin, without a demand, has been supported, for a taking of goods, are authorities for the maintenance of trespass in the present case.

The following cases of trover are in point. In *Hurst* v. *Gwennap*, 2 Stark. R. 306, the assignees of a bankrupt sustained an action of trover, without a previous demand, for goods sold to the defendant by the bankrupt, after a secret act of bankruptcy, of which the defendant had no knowledge. Lord Ellenborough said, "the very act of taking the goods from one, who had no right to dispose of them, was in itself a conversion." And this was confirmed by the whole court of king's bench. S. P. *Soames* v. *Watts*, 1 Car. & P. 400; *Yates* v. *Carnsew*, 3 Car. & P. 101; 2 Selw. N. P. (11th ed.) 1370, 1371. In *Hyde* v. *Noble*, 13 N. Hamp. 494, it was decided that the taking of chattels, claiming them under a sale by one who had no power to sell, was a conversion, and rendered the buyer liable to the owner, in an action of trover, without a previous demand. And in *Hoffman* v. *Carow*, 20 Wend. 21, and 22 Wend. 285, an auctioneer, to whom stolen goods were forwarded by the thief, for sale, and who sold them, and paid the proceeds to the thief, without notice of the theft, was held liable to the owner, in trover, without demand and refusal. See also *Bloxam* v. *Hubbard*, 5 East, 407.

The following cases of replevin are equally in point. In *Parsons* v. *Webb*, 8 Greenl. 38, A delivered his horse to B, to be sold for A's benefit. B sold the horse to C, his creditor, in payment of his debt, and C sold the horse to D. It was decided that A might maintain an action of replevin against D, without first demanding the horse. So in *Galvin* v. *Bacon*, 2 Fairf. 28, where A, the bailee of a horse, sold him to B, and B sold him to C, neither B nor C having any notice that the horse was not the property of A, the bailor maintained an action of replevin against C, without a previous demand.

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In all these cases, in which trover or replevin was held to be well brought, trespass might have been sustained, according to the well established law of actions. The taking, which is in itself a conversion, is such a wrongful taking as is the ground of an action of trespass. A sale of goods, which is in itself a conversion, and will support an action of trover, is also a trespass, for which an action of trespass *vi et armis* well lies.

The defendant's counsel cited 3 Steph. N. P. 2695, to this position: "Where the taking is lawful or excusable, trespass cannot, in general, be supported; but the action should be trover." All the cases which Stephens refers to, in support of this position, are actions, by the assignees of a bankrupt, against officers, for taking the bankrupt's goods in execution, after a secret act of bankruptcy, and before commission issued, or before assignment made. In such cases, it is held that trespass will not lie for the taking, but that trover, without a demand, will lie for the conversion of the goods by the sale of them, whether the sale be before or after commission issued or assignment made. Such is the result of the various decisions. See *Cooper* v. *Chitty*, 1 Kenyon, 395; 1 Bur. 20; 1 W. Bl. 65; *Smith* v. *Milles*, 1 T. R. 475; *Wyatt* v. *Blades*, 3 Campb. 396; *Carlisle* v. *Garland*, 7 Bing. 298, and 10 Bing. 452; *Potter* v. *Starkie*, 4 Scott, 718; *Lazarus* v. *Waithman*, 5 Moore, 313; *Price* v. *Helyar*, 4 Bing. 597; *Dillon* v. *Langley*, 2 Barn. & Adolph. 131. This doctrine is anomalous; but the anomaly seems to be well established in the English law.

The court of exchequer, while lord Lyndhurst was at its head, decided that trover would not lie against an officer for taking and selling goods of a bankrupt, on a *fieri facias*, after a secret act of bankruptcy, and before that act was known. *Balme* v. *Hutton*, 2 Tyrw. 17, and 2 Crompt. & Jerv. 19. But this decision was reversed in the exchequer chamber; 2 Tyrw. 620; 1 Crompt. & Mees. 262; 3 Moore & Scott, 1; 9 Bing. 471; and the doctrine of the exchequer chamber was affirmed by the house of lords, in the case of *Garland* v. *Carlisle*, 11 Bligh N. R. 421, and 4 Scott, 587. If trover wil'

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lie in such a case, without a demand, we do not readily perceive why trespass should not also lie. Trover can be maintained only on the ground that the defendant is a wrong-doer, is guilty of a conversion, which is an act as unlawful as any act for which trespass will lie. It is sometimes said that trespass cannot be maintained, in such a case, because an officer shall not be made a trespasser by relation. But if trover will lie, when the officer sells before commission issued or assignment made, it is because he is a wrong-doer by relation. It has also been said that trespass will not lie, because the assignees, at the time when the goods were taken or sold, had neither the actual nor constructive possession of them. And in *Smith* v. *Milles*, before cited, Ashhurst, J., said, he knew of no instance "where a man, who has a new right given him, which, from reasons of policy, is so far made to relate back as to avoid mesne incumbrances, shall be taken to have such a possession as to bring trespass for an act done before such right was given to him." But it has since been decided, that an administrator may maintain trespass for the taking and carrying away of goods after the death of his intestate, and before the grant of administration. *Tharpe* v. *Stallwood*, 6 Scott N. R. 715, and 5 Man. & Grang. 760. So he may maintain ejectment, and lay the demise on a day after the intestate's death, but before administration granted. 2 Steph. N. P. 1418. See also *Foster* v. *Bates*, 12 Mees. & Welsb. 226. We therefore do not regard the case of *Cooper* v. *Chitty*, and the decisions that followed it, as decisive of the question raised in the present case, in which the plaintiff's intestate had the right to immediate possession of the cow at the time when the defendant took her.

It may be here remarked, that the English law has recently been altered by *St.* 2 and 3 Vict. *c.* 29, which enacts that all executions against the property of any bankrupt, *bona fide* executed or levied before the date and issuing of the fiat, shall be deemed to be valid, notwithstanding a prior act of bankruptcy committed by the bankrupt, provided the persons, at whose suit the execution shall have issued, had not, at the

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time of executing or levying such execution, notice of any prior act of bankruptcy by him committed. See *Skey* v. *Carter*, 11 Mees. & Welsb. 571.

In Com. Dig. Trespass, D, cited by the defendant's counsel, it is said that trespass will not lie "for goods which a man has lawfully, though the possession of him from whom he had them was wrongful; as if A takes the horse of another and sells him to B, trespass does not lie against B." The same position is found in Hammond's Nisi Prius, 224, where it is stated as a *dictum*, and not as an adjudication; and in 5 Dane Ab. 582, where it is said that if B buys *bona fide*, he is not liable to an action of trespass. The source of this supposed doctrine is 2 Rol. Ab. 556, where the case of *Day* v. *Austin & Bisbitch* is referred to. This case is reported in Owen, 70, and Cro. Eliz. 374; and it does not appear, from either of the reports, that any such point was adjudged. According to Owen's report, the court *said*, "If a stranger takes my horse and sells him, a trespass will not lie against the vendee, but a detinue." Mr. Justice Cowen, in *Barrett* v. *Warren*, 3 Hill, 348, delivered an instructive opinion on this point, and very thoroughly examined all the English authorities. "The result is," he said, "that no English *adjudication* creates an exception in favor of one who purchases from the tortious taker of another's property."

The case of *Marshall* v. *Davis*, 1 Wend. 109, which was cited for the defendant, is a direct decision against the maintenance of the present action. It was there held, upon the authority of the passages in Bacon, already referred to, and in the acknowledged absence of any previously adjudged case in point, that replevin could not be maintained by a bailor against one who buys goods of a bailee who has no authority to sell them. The ground of that decision was, (in the language of Savage, C. J.,) that "there was, technically, no taking of the property, to subject the defendant to the action of trespass; he having obtained possession by delivery from a person having a special property therein; of course, replevin is not the proper remedy, but detinue or trover." The same doc-

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trine was affirmed in *Barrett* v. *Warren*, 3 Hill. 348, and recognized in *Pierce* v. *Van Dyke*, 6 Hill, 613. And in *Nash* v. *Mosher*, 19 Wend. 431, it was decided, on the same grounds, that trespass could not be maintained in a similar case. But, as these decisions were made upon a view, which we cannot adopt, of the meaning and effect of the passages cited from Bacon, and are contrary to numerous adjudications which we have already referred to, we cannot yield our assent to them. It was said by Cowen, J., in *Barrett* v. *Warren*, that "an exception in favor of the taker, where he is a *bona fide* purchaser from the wrong-doer, has found its way into the books, and that, however discordant it be with established principles, it may, at least in this state [New York], have become too inveterate to be displaced." We are not embarrassed by any decisions in this commonwealth, which are discordant with established principles; and therefore we deem ourselves not only warranted, but bound, to decide this case according to those principles, which we find well stated by Weston, J., in *Galvin* v. *Bacon*, 2 Fairf. 30, 31, as follows: "Whoever takes the property of another, without his assent, express or implied, or without the assent of some one authorized to act in his behalf, takes it, in the eye of the law, tortiously. His possession is not lawful against the true owner. That is unlawful, which is not justified or warranted by law; and of this character may be some acts, which are not attended with any moral turpitude. A party honestly and fairly, and for a valuable consideration, buys goods of one who had stolen them. He acquires no rights under his purchase. The guilty party had no rightful possession against the true owner, and he could convey none to another. The purchaser is not liable to be charged criminally, because innocent of any intentional wrong; but the owner may avail himself, against him, of all civil remedies provided by law for the protection of property. If the bailee of property for a special purpose sells it without right, the purchaser does not thereby acquire a lawful title or possession. In the case before us, the defendant came honestly by the horse, but he did not receive

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possession of him from any one authorized to give it, and is therefore liable *civiliter* to the true owner for the taking, as well as for the detention." It may be added, that it is a familiar rule, that a wrongful intention need not be proved, in order to render an act a trespass. Probably one half of the cases, in which trespass *de bonis asportatis* is maintained, arise from a mere misapprehension of legal rights.

Upon a considerate view of the principles on which the present action rests, and of the application of those principles in the recent adjudications, in England and in this country, a majority of the court are well satisfied, notwithstanding the decisions in New York, that the plaintiff has not mistaken his remedy.

WILDE, J. I agree in opinion with my learned brethren, that no valid title to the cow in question passed to the defendant, by the deed of mortgage from Franklin to him, although he believed, and had good reason to believe, that Franklin was the true owner. I agree also, that the doctrine cited from the year book, 21 H. 7, 39, cannot be maintained. It is there laid down, that if a bailee of goods gives or sells the goods to a stranger, and makes delivery of them, the owner cannot have a writ of trespass; meaning, as I understand the doctrine, that by such a sale and delivery the property was changed and thereby vested in the stranger. It is also laid down in the same case, that if the goods were sold without delivery, and the stranger takes them away, he is a trespasser; for by the sale the property was not changed, but by the taking. I think this doctrine also cannot be maintained. For the sale is good, as between the parties, without a delivery. And the sale, with or without a delivery, could not divest the owner's title. If the property be taken wrongfully, by a stranger, from the bailee, and he is sued by the bailee, and full damages are recovered against him, that may bar the owner's right of action, as the trespasser should not be twice charged. I think, therefore, that this case is not to be decided by the distinction laid down in the case cited from the year book.

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I agree also with my learned brethren, that if the taking by the defendant were tortious, the plaintiff might well maintain either trespass or trover or replevin in the *cepit;* but I cannot agree that in all the cases, in which trover may be maintained without a demand, trespass or replevin may also be maintained. To maintain these actions, the taking must be unlawful. In this commonwealth, replevin will lie for an unlawful detention. And trover also will lie where the taking is lawful, and the taker afterwards converts the property to his own use. No demand is necessary, if the conversion is proved *aliunde.* For instance; trover might be well maintained against Franklin, upon the facts reported in this case; but not trespass; for he had the lawful possession, and by his mortgage to the defendant he converted the property to his own use. In such case, no demand of the property would be necessary. So, if a man finds property, he may lawfully take it, and take care of it; but if he afterwards sells it without authority, that, *ipso facto,* will be a conversion, and trover would be the appropriate action. And there is no reason, as it seems to me, why the owner should be allowed to maintain trespass also; and no such action ever has been maintained, where the taking was lawful.

This case, therefore, depends upon the question, whether one who in good faith obtains possession of goods or chattels from a party in possession, under a sale from him, is liable to an action of trespass by the true owner. On this question numerous decisions and authorities have been cited. On the part of the plaintiff, several cases have been cited, according to which the taking under a *bona fide* purchase from a bailee or a person in the lawful possession of goods, but who has not a right to sell or dispose of them, is an unlawful act and a trespass against the true owner. On the other hand, many contradictory decisions and authorities have been cited by the defendant's counsel, which appear to me to be founded on a more just and reasonable principle. I think the weight of authority is most decidedly opposed to the maintenance of an action of trespass in a case like this. I think it clear that in

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England no such action can be maintained. This appears by the rule of law laid down as to the distinction between the actions of trespass and trover, in *Cooper* v. *Chitty*, 1 Bur. 20, and in numerous cases there cited; and in *Balme* v. *Hutton*, 9 Bing. 471; in *Wilson* v. *Barker*, 4 Barn. & Adolph. 614; in *Nixon* v. *Jenkins*, 2 H. B. 135, and in many other cases.

In *Cooper* v. *Chitty*, lord Mansfield lays down the distinction between the two actions with great clearness. That was an action of trover against the sheriff for seizing the goods of a bankrupt after a secret act of bankruptcy and before the issuing of the commission. The goods were afterwards sold by the sheriff; and it was held that this was a conversion, for which trover would lie, but not trespass; the taking being lawful or excusable. "The fallacy of the argument from the authority of certain cases turns," said lord Mansfield, "upon using the word lawful equivocally in two senses. To support the act, it is not lawful; but to excuse the mistake of the sheriff, through unavoidable ignorance, it is lawful. Or in other words, the relation introduced by the statutes binds the property; but men, who act innocently at the time, are not made criminal by relation; and therefore they are excusable from being punishable by action or indictment, as trespassers. What they did was innocent, and in that sense lawful." The same distinction is made in *Smith* v. *Milles*, 1 T. R. 480. And Ashhurst, J., adds, that "the plaintiffs are not injured, as it is competent to them to recover the value of the goods, by bringing a proper action, namely, an action of trover. But the officer shall not be harassed by this species of action, in which the jury might give vindictive damages."

In *Balme* v. *Hutton*, it was held, in the court of exchequer, that an officer, in a like case, was not liable in any form of action; but that much disputed point is not material in the present case. That was an action of trover, and the distinction between trespass and trover was not discussed. In the court of exchequer, a writ of error was brought, and it was held that the defendant was liable in trover for the conversion of the property, but not for the taking, either by an officer or any

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other person. And it seems to me impossible to hold otherwise upon principle. The taking was lawful; for no one but the bankrupt had the possession or the right of possession at the time, and unless a commission had been issued within a limited time, the assignee would have acquired no right to the property.

It is clear, Park, J., says, that the sheriff has not been held to be a trespasser in such a case as that; and no judge in any other case has so considered him. Tindal, C. J., says that the distinction laid down by lord Mansfield was a sensible and rational distinction; and as the sheriff acted innocently in the taking, he should not be liable in that form of action, in which the jury may give damages for the taking, distinct from the value. And Patteson, J., made a similar remark. On this point, the law seems to be clear. The main question in that case was, whether the sheriff was liable in any form of action. But as to the form of the action, it was held that trover was the appropriate action, and it was immaterial whether the taking was by the sheriff or any other person. The case of *Wilson* v. *Barker*, 4 Barn. & Adolph. 614, is a very strong case on this point. It was held in that case, that a man who knowingly receives from another a chattel, which the latter had wrongfully seized, and afterwards refuses to give it back to the owner, on demand, does not thereby become a trespasser, unless the chattel was seized for his use. The same distinction is well established in New York. In *Barrett* v. *Warren*, 3 Hill, 348, it was held, that though goods have been tortiously taken, a *bona fide* purchaser from the wrong-doer is not answerable to the owner in trespass, but only in trover, or replevin in the *detinet*, after demand. A man, it is said, and very justly I think, who innocently purchases property, supposing he should acquire a good title, ought not to be subjected to an action, until he has had an opportunity to restore the goods to the true owner. The case of *Hoffman* v. *Carow*, 20 Wend. 21, and 22 Wend. 285, is not in point. It was in that case held that an auctioneer, to whom stolen goods were forwarded by the thief, for sale, and

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who sold them, and paid the proceeds to the thief, without notice of the theft, was liable to the owner in trover, without demand, &c. This, though a hard case for the auctioneer, was, I have no doubt, rightly decided. No demand was necessary, for the sale was a conversion.

In Maine and New Hampshire, it has been held that trespass would lie in a case like this. But the cases do not appear to have been decided upon a full examination of the authorities. The ancient authorities are not referred to, and the cases were certainly imperfectly argued by counsel. I have great respect for the opinions of the learned judges of those courts, but I cannot concur in their decisions in the cases referred to.

The case of *Galvin* v. *Bacon*, 2 Fairf. 28, was decided on a rule laid down by Weston, J., which, in my judgment, requires qualifications. It is said that whoever takes the property of another, without his assent, express or implied, or without the assent of some one authorized to act in his behalf, takes it, in the eye of the law, tortiously. The rule laid down by lord Mansfield, in *Cooper* v. *Chitty*, and approved by so many learned judges in England, and in New York, appears to me more accurate and just. A man who finds lost goods, and takes them to preserve them for the true owner, is certainly no trespasser, and if afterwards he converts them to his own use, the owner not appearing to claim them, he is not liable in trespass. So the innocent purchaser of goods from a person to whom the owner has intrusted them is excusable. In ancient times it was held by some, that where a bailee sold goods, the owner could not retain them. That is not so; but it is law now, that if the goods are taken from the bailee, and he sues the trespasser and recovers full damages, that will bar the owner's right of action.

It seems to me, therefore, considering these and other modern decisions, that the weight of authority is decidedly opposed to the maintenance of an action of trespass in a case like this. But were it otherwise, we must fall back upon the ancient authorities, if the law has not been already settled in

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this commonwealth. And those authorities are all in favor of the defendant. The doctrine is so laid down in 2 Rol Ab. 556; in Com. Dig. Trespass, D.; in Bac. Ab. Trespass, E.; and in recent decisions in England already referred to, as to the distinction between the actions of trespass and trover. See also *Storm* v. *Livingston*, 6 Johns. 44; *Bradley* v. *Davis*, 2 Shepley, 44; *Brown* v. *Campsall*, 6 Har. & Johns. 491. The principle established by the ancient authorities is most just and reasonable. If a party trusts his goods to an unfaithful bailee or keeper, who sells them, without authority, to a *bona fide* purchaser, the least the owner should be bound to do is to give him notice, so that he may have an opportunity to restore them; unless he should have sold the goods to another, thereby rendering a demand of the goods useless. And so has always been the law, as I think, in this commonwealth; and if this does not appear clearly by our reports, it must be because the law has been considered by the profession as clearly settled. I have always so considered it, certainly. I well remember to have had occasion to consider the question, and to examine the authorities, more than fifty years ago. A farmer had let his farm, and by the contract the tenant was to have the use of a yoke of oxen belonging to the lessor. The tenant sold the oxen to a *bona fide* purchaser, and received payment; and I was applied to to bring an action against the purchaser. I was satisfied that an action of trespass could not be maintained, and advised my client to make a demand of the oxen; after which I commenced an action of trover, which was defended on the ground that the sale to the defendant was valid; the tenant having a special property in the oxen. But the action was sustained, notwithstanding some of the authorities cited in this case.

On looking into 1 Bur. 20, since this case was argued, I found a memorandum made by me in the margin of the report of the case of *Cooper* v. *Chitty*, that trover, not trespass, would lie in that case; and a reference is made to *Smith* v. *Milles*, 1 T. R. 475. There are no marginal notes in my edition of Burrow, and I have little doubt that that memoran-

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dum was made when I examined the authorities in the case above stated. This, however, is immaterial. But we have better authorities in support of the law of Massachusetts. In 5 Dane Ab. 582, it is laid down as settled law, that trespass would not lie for lost goods taken up to preserve them for the owner; nor for goods which a man has lawfully received from a party in possession. Mr. Dane had a very extensive knowledge of the decisions of our courts, before the regular reports commenced, and is the best authority we have as to the previous decisions of the courts, and the understanding of the state of the law by the profession. If there had been any decision contravening the ancient English authorities, especially after the distinction between the actions of trespass and trover had been so clearly stated by lord Mansfield, nearly a century ago, it would have been preserved by Mr. Dane.

Cowen, J., in his dissenting opinion in *Barrett* v. *Warren*, cites the case of *Higginson* v. *York*, 5 Mass. 341, in support of his opinion; but it is quite clear, that the question as to the form of the action was not and could not be raised in that case, which was an action of trespass *quare clausum*, and for taking away three hundred cords of the plaintiff's wood. Both the defendants entered, and took away the wood, and trespass was the proper remedy. One of the defendants purchased the wood from the trespasser who cut it down; and the court say, that he acquired no title thereby; meaning, doubtless, no valid title. It is therefore clear, that nothing appears to show that in this commonwealth an action of trespass has ever been maintained, or has even been attempted to be maintained, in a case like this. On the contrary, it has been determined in a case of trespass on real estate, depending on the same principle as trespass for taking personal property, that the action could not be maintained against the feoffee or lessee of a disseizor. The law laid down in Bro. Ab. Trespass, 35, and by lord Coke and sundry other authorities, is, (although there are some cases to the contrary,) that if a disseizor makes a lease or feoffment, and the disseizee afterwards enters, he cannot maintain trespass against the feoffee or lessee, because

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the feoffee or lessee came in by title. This question came up in the case of *Emerson* v. *Thompson*, 2 Pick. 473, which was an action of trespass for mesne profits against the heirs of the disseizor after recovering possession against the heirs, in a writ of entry. And the court were all of opinion, that the defendants were not liable for any profits received after their entry and before the commencement of the writ of entry. But a majority of the court were of opinion, that after the commencement of the writ of entry, the withholding of the possession by the heirs was wrongful, and unless the plaintiff could recover in that form of action he could have no other remedy. That case depends on the same principle as an action against the *bona fide* purchaser of personal property from the party having possession, but having no right to sell the same as against the true owner; with this difference, that in the latter case the owner has a clear and adequate remedy in an action of trover. Upon a careful consideration of these and other authorities, and upon principle, I am of opinion that the defendant is not liable in this form of action; nor would he be liable in an action of trover, for he has not been guilty of a conversion of the property. The conversion was by Franklin, against whom an action of trover might be well maintained; and if he is not able to respond in damages, the loss ought to be borne by the plaintiff who confided the property to his custody, rather than by the defendant who has been guilty of no wrong. But no loss need be sustained by the plaintiff, for after a demand of the defendant and his refusal to restore the property, an action of replevin in the *detinet* would well lie. For these reasons, notwithstanding my great respect for my learned brothers, I am unable to concur with them in overruling these exceptions.

Exceptions overruled

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The Connecticut River Railroad Company *vs.* Ebenezer Clapp.

Where a jury, summoned to reassess damages for land taken for a railroad, rendered a verdict, in which they assessed the damages at a certain sum, "with interest thereon from the time when the said railroad company took possession of the land," it was held, that the verdict was void for uncertainty, and that the cour of common pleas had no authority to alter the same, or to supply any defect therein.

On the hearing before a jury summoned to reassess damages for taking land for a railroad, the party claiming damages has the right to open and close.

Where the court of common pleas set aside a verdict of a jury, summoned to reassess damages for land taken for a railroad, they have no authority to award costs to the party objecting to the verdict.

The county commissioners of Hampshire having estimated the damages of Ebenezer Clapp, of Hatfield, caused by the taking of his land for the location and construction of the road of the Connecticut River Railroad Company, the company, on the 2d of March, 1847, feeling aggrieved at the proceedings of the commissioners therein, requested them to cause a jury to be summoned for the purpose of reassessing the damages. A warrant was accordingly issued, in pursuance of which a jury was summoned and empanelled, who, on the 23d of June, 1847, after hearing the case and viewing the premises, rendered a verdict assessing the damages at "five hundred and seventy-five dollars, with interest thereon from the time when the said railroad company took possession of the land."

The verdict being returned into the court of common pleas, at the October term, 1847, the petitioners moved that it be accepted for the sum of five hundred and seventy-five dollars.

The respondent moved that it be set aside: 1st, because it is in its terms uncertain and therefore insufficient; 2d, because the officer presiding at the hearing before the jury ruled, that the petitioners had the right to open and close, and the hearing proceeded accordingly.

The court of common pleas ordered the verdict to be set aside, for the reasons stated, and rendered judgment for costs

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in favor of the respondent against the petitioners; who, thereupon, appealed to this court.

C. P. Huntington, for the petitioners. The statute of 1847, *c.* 259, which went into operation on the 24th of May, 1847, gives a right to lawful interest on the damages, as well as to costs.

1. The verdict is for five hundred and seventy-five dollars with interest thereon from the time when the petitioners took possession of the land. This is sufficiently certain in terms. *Merrill* v. *Berkshire*, 11 Pick. 269; *Hodges* v. *Hodges*, 5 Met. 205. The time of taking possession, from which the interest is to be computed, is the time of filing the location. *Charlestown B. R. Co.* v. *County Comm'rs*, 7 Met. 78. And the interest may be computed accordingly. The location is to be filed with the commissioners, and the verdict is to be certified to them. They can compute the interest and render it certain. But if the verdict be defective in this respect, it may be remedied by rejecting a part of it. *Lincoln* v. *Hapgood*, 11 Mass. 358. Or the interest may be considered as a part of the damages. If the verdict be set aside for this cause, the case ought to be opened only as to the question of interest. A verdict may be void in part, and good in part. *Winn* v. *Columbian Ins. Co.*, 12 Pick. 279; *Boyd* v. *Brown*, 17 Pick. 453; *Robbins* v. *Townsend*, 20 Pick. 345; *Sprague* v. *Bailey*, 19 Pick. 436, 442.

2. The petitioners, being the aggrieved party, were entitled to open and close. They have many affirmative facts to show, in the first instance; and the practice is, that they go forward. There is no reason why the same rule should not apply in this as in other cases. *Ayer* v. *Austin*, 6 Pick. 225.

C. Delano, for the respondent. The statute of 1847 was enacted subsequently to the commencement of this proceeding and cannot affect it.

1. The verdict is so uncertain, that it cannot be enforced without some further inquiry. It stands, in this respect, upon the footing of an award; and an award is void, if it require any further hearing. Billing on Awards, 130; *Hewitt* v

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Hewitt, 1 Ad. & Ell. N. S. 110; Com. Dig. Arbit. E, 11; *Lincoln* v. *Whittenton Mills*, 12 Met. 31. The question, then, is whether this verdict involves any new inquiry. The interest is a part of the damages, and as it is to be assessed from a particular time, that time is a fact to be established like any other. The taking possession of the land is the time from which interest is to run. Does this mean the filing of the location, or the taking of actual possession? This question must be decided upon by some competent tribunal; and thus some further inquiry is necessary to render the verdict certain.

2. It is important, in cases of this kind, that the strict rules of practice should be observed. Who is the actor? Who sets up the claim? Is it the petitioners or the respondent? Have the petitioners any thing to answer, until something is made out on the other side? Damages are not to be presumed in the outset. The rule is universal, that in inquiries as to damages, the actor goes forward. 1 Arch. N. P. Int. 4, 5; 1 Greenl. Ev. §§ 75, 76, 77; *Mercer* v. *Whall*, 5 Ad. & Ell. N. S. 447, where the rule is laid down by lord Denman. The form of the issue is not to be looked at so much as the substance. The case is precisely analogous to an appeal. If there has been any mistake in this point, the respondent is entitled to a new trial. *Davis* v. *Mason*, 4 Pick. 156; *Ayer* v. *Austin*, 6 Pick. 225; *Robinson* v. *Hitchcock*, 8 Met. 64.

Huntington, in reply. It is said, that the statute of 1847 is not applicable to the case, because it was not passed, until after these proceedings were commenced. The answer is, that the statute is remedial. But, in fact, the present petition was commenced after the passing of the act.

As to the other point; — the respondent had had his damages awarded and was satisfied. The petitioners undertook to show, that the amount was excessive. To do this they must go forward. If they had any thing to do, in the first instance, they were entitled to open and close.

Wilde, J. This case comes before us on an appeal from the judgment of the court of common pleas. On the appli-

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cation of the petitioners to the county commissioners, for a jury to reassess the damages on the location and construction of a railroad over and across the respondent's lands, a warrant was issued to summon a jury for that purpose, who were duly summoned, as the law directs, and who, after hearing the parties, returned their verdict to the court of common pleas, who, after hearing the parties, ordered and decreed, in the premises, that the verdict of the jury should be set aside, and that the respondent recover his costs of suit.

The court of common pleas, as we understand, set aside the verdict for two reasons: 1st, because the verdict was uncertain, the same being for a certain sum, with interest from the time when the petitioners took possession of the respondent's land; 2d, because the officer who presided at the hearing before the jury erroneously ruled, that the petitioners had the right to open and close, and that the hearing proceeded accordingly.

The counsel for the petitioners contends, that the verdict is sufficiently certain, as the court of common pleas were authorized to compute the interest and add it to the sum assessed. But we think the court were not so authorized by the Rev. Sts. *c.* 24. By the thirty-fourth section, the court are authorized to receive the verdict, and adjudicate thereon, or to set it aside for good cause; and by the thirty-seventh section, if the verdict be accepted and recorded by the court, it is to be conclusive on the parties to the proceedings; but the court are not authorized to alter the verdict, or to supply any defect therein, by any provision in the revised statutes. It is however argued, that this authority is given by the statute of 1847, *c.* 259, § 3, which provides that the county commissioners may issue warrants of distress, to compel the payment of the damages assessed by the commissioners, or by the verdict of a jury, together with costs and lawful interest. But the power thus given by the statute is not sufficient to cure the defect in the verdict. If the court of common pleas had rejected that part of the verdict relating to interest, and had so certified the verdict to the county commissioners, the

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commissioners would not be authorized to compute any interest before the return of the verdict, or before the time when the verdict was given; whereas the jury intended that the interest should be computed from the time when the petitioners took possession of the respondent's land. We are of opinion, that the statute of 1847 cannot be so construed as to authorize the commissioners to compute interest, before the assessment of the damages, upon which the computation is to be made. Another decisive objection to such a computation of interest is, that the commissioners have no authority to ascertain the time when the petitioners took possession of the respondent's land. That was a fact for the jury to find.

As to the other ground of objection to the verdict, it seems to us quite clear, that the ruling of the presiding officer at the trial was erroneous. In cases where a reassessment of damages is to be made by a jury, after an assessment has been made by the commissioners, it is immaterial which party makes the application for such reassessment. The party claiming damages, the same being unliquidated, and to be settled by the jury, has the right of opening and closing the cause. 1 Greenl. Ev. §§ 76, 77; *Mercer* v. *Whall*, 5 Ad. & Ell. 447. In this case, the rule is, as we think, correctly laid down by lord Denman, and is decisive as to the present case. "Wherever," he says, "from the state of the record at Nisi Prius, there is any thing to be proved by the plaintiff, whether as to the facts necessary for his obtaining a verdict, or as to the amount of damages, the plaintiff is entitled to begin." But where the *onus probandi* lies in the first instance on the defendant, he is entitled to begin. *Wootton* v. *Barton*, 1 Mood. & Rob. 518. So, in *Davis* v. *Mason*, 4 Pick. 156, it was decided, that where in trespass the defendant pleads soil and freehold in himself, without any other plea, and the issue is joined thereon, the right of opening and closing the argument before the jury belongs to the defendant. But it would have been otherwise, if the defendant had likewise pleaded the general issue. These latter cases obviously have no bearing on the present question. The only question for the

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jury in this case was a question of damages, which they were bound to assess without any regard to the previous assessment by the commissioners. There seems, therefore, no reason for allowing the petitioners to open and close. The result is, that the order of the court of common pleas setting aside the verdict is affirmed, and the judgment for the respondent for costs is disaffirmed. The allowance of costs was premature; the court should have ordered a certificate of their adjudication to be transmitted to the county commissioners, in order that the petitioners might make application, if they should think fit, for a warrant to summon a new jury, as the law directs. Rev. Sts. c. 24, § 36.

Such a certificate of the adjudication of this court is to be transmitted to the county commissioners with the papers for further proceedings.

Charles Coates *vs.* Oliver Blush & another.

Where a bankrupt, under the United States bankrupt act of 1841, knowing that one of his creditors, who is about to oppose his discharge, can prove that he has done acts, which, if shown to the district court, would prevent him from obtaining his discharge, pays such creditor a sum of money to induce him not to oppose the discharge, and such creditor thereupon withdraws his opposition, and the bankrupt obtains his discharge, the same may be impeached and avoided under the fourth section of the act.

This was an action to recover the amount due the plaintiff on sundry notes of hand signed by the defendants. The writ was dated the 24th of January, 1845. The causes of action accrued before the 13th of January, 1843.

The defence was a certificate of discharge under the bankrupt law of the United States, granted by the district court of Massachusetts, on the 1st of December, 1843, upon a petition filed therein on the 13th of January, 1843.

At the trial, which took place in this court before *Dewey*, J., various grounds were relied on by the plaintiff to impeach and defeat the discharge: 1st, that preferences had been made

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in favor of particular creditors, in violation of the bankrupt law; 2d, that the defendants did not surrender their whole property; 3d, "that after the defendants had filed their petition for said discharge, and notice had been issued to their creditors of the court at which to appear and be heard upon said petition, the said defendants, in consideration that C. W. Moore, a creditor of said defendants residing in New York, and to whom said defendants were indebted in the sum of about $300, would not appear and oppose said petition, paid to said creditor fifty per cent on his said debt."

Evidence was introduced by the defendants, tending to establish the fact stated in the third specification; and it appeared, that the dividend paid to the creditors generally, from the estate of the defendants, was less than four per cent.

It did not appear, that the payment of fifty per cent to Moore, by the defendants, was made from any part of their property, which should have gone into the hands of their assignee for distribution.

Evidence was also introduced upon the first and second grounds above specified, and was submitted to the jury under instructions which were not objected to. But the jury, being unable to agree upon a verdict as to these points, returned a verdict in favor of the plaintiff solely upon the third ground.

The questions reserved for the consideration of the whole court arose on the following instructions of the presiding judge, with reference to the third ground relied upon by the plaintiff to impeach the discharge:

"The plaintiff insists that this discharge is invalid by reason of the fraudulent conduct of the defendants in procuring the same. The fraud is said to be established by certain acts supposed to be a fraud upon the bankrupt law, being an attempt to defeat the provisions thereof, and particularly those enactments intended to secure the full surrender of all the property of the bankrupt, and a full and *bona fide* compliance in all the particulars required by the statute.

"To secure this object, the statute has made certain provisions as to the application of a bankrupt for his discharge,

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requiring notice to the various creditors, who have proved their debts, of the time and place assigned for hearing the said application, and authorizing such creditors to object to the granting of such discharge, if such bankrupt has made any preference, or done other acts, forbidden by the statute, and upon such objection being sustained by proof, the discharge is to be refused.

"Upon this point, the jury will, for the purposes of the present trial, take the rule of law to be, that if the evidence satisfies them that the defendants, — knowing that one of their creditors, who had a legal demand, that would entitle him to appear and oppose the granting of their discharge, upon the ground, that the bankrupts had done such act or acts, as would have precluded them from being discharged, had their application been opposed, which it would have been but for the fraudulent interference of the defendants in preventing such opposition, by paying such creditor, was about to oppose the granting of said discharge for the causes aforesaid, — paid such creditor a large sum of money, to wit, $150, the same being at the rate of fifty per cent upon the entire debt of said creditor, the said sum so paid being a sum very much larger than the amount he would have received as his *pro rata* dividend, said latter sum not exceeding four per cent; — and if the jury find that such payment was made designedly, and for the purpose of inducing such creditor to agree to withdraw all opposition to their application for a discharge, which opposition was about to be made, and which would otherwise have been made; — and that by reason of such fraudulent interposition of the defendants, said creditor withdrew his opposition, and no opposition being made to the granting of said discharge, the defendants thereupon obtained their discharge; — which might have been prevented, if the defendants had not interfered, and induced said creditor to withdraw his opposition to said discharge, by the payment of said sum of money, upon an agreement that he would withdraw his opposition to said discharge; — such acts on the part of the defendants would operate to defeat their discharge, and the

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plaintiff might avoid it. The case must be one showing fraudulent misconduct on the part of the defendants, and the payment must be made for a fraudulent purpose.

"To constitute it such, the motive for the payment of the money must have been to avoid an opposition from a creditor, which might have been effectual to defeat the application for a discharge. If made for other purposes, and not with that view, the payment of the whole or any part of a debt, after the party had filed his petition in bankruptcy, if paid out of assets acquired after he had been declared a bankrupt, would be a lawful act, and could not affect his discharge."

If these instructions were wrong, a new trial is to be granted; otherwise, judgment is to be rendered on the verdict.

C. P. Huntington, for the defendants. 1. The instructions are objectionable, in the first place, because, in effect, they submit a question of law, namely, what constitutes a fraudulent interference, to the jury.

2. But, secondly, the act alleged to have been done by the defendants is not one of the acts enumerated in the fourth section of the bankrupt law, which is the only one applicable to the case; and the provision therein relating to this subject is in the nature of a penal statute, and to be construed strictly.

3. Such an act is not sufficient, it seems, according to the decisions of this court, to avoid the discharge. See *Beekman* v. *Wilson*, 9 Met. 434; *Atkins* v. *Spear*, 8 Met. 490.

4. In all the English cases, in which contracts like that in question have been held illegal and void, it will appear either that the action was brought on the contract itself, or that the discharge was obtained by fraud; neither of which facts exists in the present case. But it has been held in England, (and the point is decisive in favor of the defendants), that inducing a creditor to withdraw his opposition is not a cause for setting aside a certificate. 6 Ves. 4; *Lewis* v. *Chase*, 1 P. Wms. 620, cited in Powell on Contracts, 194.

W. G. Bates & H. W. Bishop, for the plaintiff.

The instructions were very hard upon the plaintiff, and it is difficult to see how the defendant could complain of them.

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All the provisions of the bankrupt law, on which the plaintiff relies, are contained in the fourth section. The acts thus prohibited are a fraud on the bankrupt law, because they are a fraud upon other creditors. *Jackson* v. *Duchaire*, 3 T. R. 551; *Cockshott* v. *Bennett*, 2 T. R. 763; *Jackson* v. *Lomas*, 4 T. R. 166, and remarks of Ashhurst, J., on page 169; *Jones* v. *Barkley*, 2 Doug. 684, and 1 Cooke B. L. 465, 470; *Leicester* v. *Rose*, 4 East, 372; *Steinman* v. *Magnus*, 11 East, 390; *Butler* v. *Rhodes*, 1 Esp. R. 236; *Holmer* v. *Viner*, 1 Esp. R. 132; *Thomas* v. *Rhodes*, 3 Taunt. 477; *Holland* v. *Palmer*, 1 Bos. & Pul. 95; *Butt, Ex parte*, 10 Ves. 359; *Sumner* v. *Brady*, 1 H. B. 647, and 1 Cooke B. L. 467; *Robson* v. *Calze*, 1 Doug. 228, and 1 Cooke B. L. 465; *Waite* v. *Harper*, 2 Johns. 386; *Bruce* v. *Lee*, 4 Johns. 410; *Wiggin* v. *Bush*, 12 Johns. 306; *Yeomans* v. *Chatterton* 9 Johns. 295.

The fraudulent acts, intended to be prohibited by the statute, are frauds at common law, and frauds in contravention of the bankrupt law. *Mawson, Ex parte*, 6 Ves. 614; *Butt, Ex parte*, 10 Ves. 359; *Hall, Ex parte*, 17 Ves. 62; *Cawthorne, Ex parte*, 19 Ves. 261, note 2 (Sumner's ed.); Eden B. L. 408, 427.

If the parties to such acts may not avoid them on the ground of fraud, third persons are not precluded from so doing. *Hull* v. *Blake*, 13 Mass. 153, 157; *Potter* v. *Wheeler*, 13 Mass. 504; *Winchel* v. *Stiles*, 15 Mass. 230; *Borden* v. *Fitch*, 15 Johns. 121; *Andrews* v. *Montgomery*, 19 Johns. 162.

The distinction between giving money to sign, and to withdraw opposition, is without a difference.

Huntington, in reply. The English cases are not applicable, because the acts, which were there held illegal, were expressly made so by statute; and the cases cited from the New York reports doubtless stand upon the same footing.

In the present case, it does not appear, that any one was prevented from opposing the discharge.

The question depends upon a fair construction of the bankrupt act; and, upon principles of common sense no one

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reading it would ever suppose, from its terms, that such an act as that of the defendants, would invalidate their discharge.

METCALF, J.* We must infer from the verdict that the defendants paid to one of their creditors a large sum, knowing that he could prove that they had done acts which would, if shown to the district court, have prevented their obtaining a discharge; that such creditor was about to oppose their discharge, and that they paid him said sum for the purpose of inducing him not to oppose their discharge, which he would have opposed, if they had not so paid him; that he, in consequence of such payment, forbore to oppose their discharge; and that they thereupon obtained their discharge which might have been prevented, if they had not, by such payment, induced him not to oppose it. Upon these facts, the question is, whether the defendants' discharge is avoided by the fourth section of the United States bankrupt act of 1841.

The second section of that act declares that "all future payments, securities, conveyances or transfers of property, or agreements made or given by any bankrupt, in contemplation of bankruptcy, and for the purpose of giving any creditor, indorser, surety, or other person, any preference or priority over the general creditors of such bankrupt, and all other payments, securities, conveyances or transfers of property, or agreements made or given by such bankrupt, in contemplation of bankruptcy, to any person or persons whatever, not being a *bona fide* creditor, or purchaser for a valuable consideration, without notice, shall be deemed utterly void, and a fraud upon this act; and the assignee under the bankruptcy shall be entitled to claim, sue for, recover and receive the same as part of the assets of the bankruptcy; and the person making such unlawful preferences and payments shall receive no discharge under the provisions of this act." "And in case it shall be made to appear to the court, that the bankrupt, his application being voluntary, has, subsequent to

* *Forbes*, J., did not sit in this case.

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the first day of January last [1841], or at any other time, in contemplation of the passage of a bankrupt law, by assignments or otherwise, given or secured any preference to one creditor over another, he shall not receive a discharge, unless the same be assented to by a majority in interest of those of his creditors who have not been so preferred."

The fourth section (after providing for the granting of a discharge and certificate to bankrupts who shall *bona fide* surrender their property, obey the orders of court, and otherwise conform to all the other requisitions of the act) contains the following clause: "If any such bankrupt shall be guilty of any fraud or wilful concealment of his property or rights of property, or shall have preferred any of his creditors, contrary to the provisions of this act, or shall wilfully omit or refuse to comply with any orders or directions of such court, or to conform to any other requisites of this act, or shall, in the proceedings under this act, admit a false or fictitious debt against his estate, he shall not be entitled to any such discharge or certificate." A further provision in the same section is, that "such discharge and certificate, when duly granted, shall, in all courts of justice, be deemed a full and complete discharge of all debts, contracts and other engagements of such bankrupt, which are provable under this act, and shall be and may be pleaded as a full and complete bar to all suits brought in any court of judicature whatever, and the same shall be conclusive evidence, of itself, in favor of such bankrupt, unless the same shall be impeached for some fraud or wilful concealment by him of his property or rights of property, as aforesaid, on prior reasonable notice specifying in writing such fraud or concealment."

In the latter of these clauses, the only enumerated causes for impeaching a discharge are fraud and wilful concealment of property by the bankrupt; though, in the former clause, not only fraud and concealment of property by him, but also a preference given by him to any creditor, a wilful omission by him to comply with any orders of the court, or to conform

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to any other requisitions of the act, and the admitting by him of any false or fictitious debt against his estate, are made sufficient cause for withholding a discharge. And it was contended by counsel, in the case of *Beekman* v. *Wilson*, 9 Met. 434, that a preference given by a bankrupt to one of his creditors was not a cause for impeaching his discharge, although it might have prevented his obtaining it; and that the fraud, for which a discharge might be impeached, was fraud at the common law exclusively, and not those acts which are declared, by the second section of the bankrupt law, to be a fraud on that law. But it was held otherwise, in that case, and the discharge was decided to be void by reason of the bankrupt's having preferred one creditor to another. The same was held in *Brereton* v. *Hull*, 1 Denio, 75, where it was also further held, that a discharge might be impeached and avoided by reason of the bankrupt's having made payments and transfers of property, in contemplation of bankruptcy. And in *Burnside* v. *Brigham*, 8 Met. 75, it seems to have been considered, that if a bankrupt should wilfully and fraudulently omit to insert the name of one of his creditors in the list of them which the first section of the act requires him to file, so that the omitted creditor should not have notice of the proceedings, the bankrupt's discharge might be avoided for that cause.

We are of opinion that the word "fraud" is used in the same sense in both clauses of the fourth section, and that it means something more than the acts which are mentioned in connection with it. In the latter clause, "fraud or wilful concealment of property" are the only terms used. Yet concealment of property is a fraud. In the former clause, "fraud" is united with all the enumerated causes for withholding a discharge, most of which, if not all, are frauds. The word "fraud" must therefore have a meaning which reaches and operates beyond all those enumerated causes. Otherwise, it is superfluous. And our opinion is, that the word, in both clauses, means, at least, all conduct of the bankrupt which is a fraud upon the bankrupt act, whether declared

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by the act to be such, or not. The purpose of the act was to discharge debtors, upon their honestly giving up their property to be equally divided among their creditors. All concealment of property, all preferences of one creditor over another, and all other acts inconsistent with good faith, are to be regarded as fraudulent, and as sufficient causes for barring the debtor's claim to a discharge, and to avoid a discharge after it is granted. Yet the defendants in this case contend that their discharge protects them, although they have, according to the finding of the jury, done acts which, if known to the court, before it was granted, would have prevented the court from granting it, and which would have been made known to the court, if the defendants had not, by paying money to one of their creditors, induced him to withhold such knowledge from the court.

Under the English bankrupt laws, the payment of money or giving security to a creditor, to induce him to sign a bankrupt's certificate, vitiates the discharge, on the ground of fraud. *Robson* v. *Calze*, 1 Doug. 228; *Holland* v. *Palmer*, 1 Bos. & Pul. 95; 1 Cooke Bank. Law, (8th ed.,) 470. We have seen no case, in which a discharge has been avoided in England, on the ground of the payment of money to a creditor to induce him to withdraw his opposition to a certificate; yet a bond given to a creditor, to induce him to withdraw a petition which he had preferred to the chancellor against the allowance of the certificate, has been decided to be void. *Sumner* v. *Brady*, 1 H. B. 647. See also Esp. Bank. Law, 316.

We have no occasion to express an opinion on the question, whether a payment by a bankrupt to a creditor, for such purpose, would avoid a discharge, under the United States bankrupt act, if it should not be shown that there was sufficient cause for a successful opposition. In *Chamberlain* v. *Griggs*, 3 Denio, 9, it was decided, in effect, that this would not, of itself, be such a fraud as would avoid a discharge pleaded in bar of an action against the bankrupt for an antecedent debt. The question, in that case, arose on a demurrer to a replication

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which averred that one of the defendant's creditors filed certain objections to his discharge, (some of which, if proved, might have been sufficient to prevent its being granted,) and that the bankrupt induced the creditor, by corruptly and fraudulently giving him goods of the value of $1000, to withdraw his objections, and that he did withdraw them. The court sustained the demurrer, on the ground that the replication did not aver that the objections, which the creditor withdrew, were well founded, and that, without such an averment, the charge of fraud had no basis beyond a strong inference, which was not sufficient. But, in the case now before us, we are not left to mere inference. The jury have found that the defendants induced one of their creditors, by paying him more than the amount of his dividend, to withdraw an opposition to their discharge, which would have prevailed, if it had not been withdrawn, and which would not have been withdrawn, if such payment had not been made. And we are of opinion that this was such a fraud as vitiates the defendants' discharge, under the fourth section of the bankrupt law of 1841; that it was a fraud on the other creditors, and on that law. In the case of *Robson* v. *Calze*, already cited, where notes for money had been given to a creditor, to induce him to sign a bankrupt's certificate, lord Mansfield said, that all the creditors "ought to be upon a par, and if some are induced to sign the certificate, because others have, whom they suppose to be upon a par with themselves, but who in fact have been paid, this is a gross fraud on them. If the fact had come to the knowledge of any of the creditors, and had been stated by them to the chancellor, before the allowance of the certificate, he could not have allowed it." The same principle seems to us to be applicable to the present case. The knowledge of acts done by the defendants, which would have prevented the grant of their discharge, was concealed from the district court by means of the payment of money by them, to one of their creditors, to induce him to make that concealment. All the creditors were or might have been sufferers by that concealment. In *Sumner* v.

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Brady, 1 H. B. 647, where a suit was brought on a bond given to induce a creditor to withdraw his petition against the allowance of a certificate by the chancellor, on the ground that persons, who were not creditors of the bankrupt, had sworn to debts, lord Loughborough said, "The plaintiff presented a petition, which he ought to have pursued. Instead of that, he is induced to suppress his petition, in order to gain his own debt, while all others are barred by the certificate which is secured by his suppression; and this under a law made to prevent fraud, and to secure an equal advantage to all creditors. A distinction is attempted to be made between the act of giving money for the consent of the creditor to sign the certificate, and that of giving him money to withdraw his opposition to it; as if the former act were only to be condemned. But see how the act of withdrawing an opposition stands, compared with the actual signing the certificate. The argument urged is, that it is a voluntary act; the creditor may do as he pleases. But the law feels it a mischief and a subversion of the bankrupt laws to traffic with them and the power given by those laws." And Heath, J., said, "This is a fraud affecting the other creditors, and against the policy of the law. It is a matter of choice whether a creditor will prefer a petition; but, having preferred it, he ought not to withdraw it so as to injure the other creditors."

We have seen the case of *Fox* v. *Paine*, 10 Alab. 523, where it was held that "the mere fact, that another creditor has been induced to withdraw his opposition, is not by itself a fraud on the act." If this was all that was intended to be decided we have no occasion to express any opinion concerning the decision. It would conform to the doctrine already referred to in 3 Denio, 9. But if, as it would seem from the opinion given, it was held and meant to be decided, that a bankrupt's discharge cannot be avoided by showing that he induced a creditor, by paying money to him, to withdraw an opposition, which would have prevented the discharge, if it had not been withdrawn, we cannot, for the reasons already given, concur in such decision. *Judgment on the verdict.*

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SUPPLEMENT.

Mary S. Jackson *vs.* The Boston and Worcester Railroad Corporation.

[The opinion of the court, in this cause, having been frequently referred to by counsel, and also by the court (see 1 Met. 99, and 6 Met. 447), has been thought worthy of preservation in an authentic and accessible form. The decision took place at the March term, 1837, for Suffolk. The circumstances, which prevented the case from being reported and published, by the then reporter, Mr. Pickering, in the regular series of reports, are probably stated in the following remarks of Wilde, J., when referring to it, in giving the opinion of the court in the case of *Sparhawk* v. *Bullard*, 1 Met. 95, 99.

"This claim, it is contended, is sustained by the opinion of the court, in the case of *Mary S. Jackson* v. *The Boston & Worcester Railroad Corporation*, which depended on the same title. But that opinion was founded on a misapprehension of some of the facts, which have been satisfactorily proved in the present case. One of the deeds, under which the tenants claimed in that case, was not produced; and the opinion of the court was predicated on the supposition, that the tenants had not traced back their title to Colbron's heirs. But this supposed defect in the evidence was supplied, and the tenants' title under those heirs was made to appear, on an application by the tenants' counsel to stay the judgment, which was stayed accordingly."]

The facts appear to be sufficiently stated in the opinion.

Wilde, J. The decision of this cause has been delayed under the expectation that the argument of another cause pending might throw some light upon the original titles of the parties, and the first location of the flats demanded. But as this case must be decided upon the facts reported, and as the parties have not traced back their titles to the original proprietors, we see no good reason for suspending judgment any longer. The question is, which of the parties has shown the elder and better title, for it may be, that neither party has a perfect indefeasible title. Yet if the demandant has shown an elder and better title than the tenants, she is entitled to judgment, although she may

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perhaps be hereafter dispossessed by the true owner. If A enters on the land of B and takes possession, and afterwards C enters on A and dispossesses him, A may well maintain an action against C to recover possession, although his entry on B was without right and tortious; for mere possession is a good title against a stranger having no title. It is true that a party cannot acquire a title by a tortious entry, but if he be suffered to retain possession undisturbed by the owner, he cannot lawfully be disturbed by a stranger; and by such a possession he may eventually acquire a perfect title. In the present case each party relies on a possessory title thus acquired.

It was proved at the trial, on the part of the demandant, that in 1763, one Elizabeth Glover conveyed to Joseph Jackson, the demandant's grandfather, a lot of land above the flats demanded, extending from Orange Street, now Washington Street, westerly to high water mark, together with all the flats below said high water mark belonging to said granted premises.

Joseph Jackson entered into possession of the premises and became seized of the whole, although there was no proof of any particular acts of ownership or possession of the flats. For when a man enters on land, claiming a right or title to the same, and acquires a seizin by his entry, his seizin shall extend to the whole parcel to which he has right; for in this case an entry on part is an entry on the whole. *Kennebeck Purchase* v. *Springer*, 4 Mass. 418. And, upon the same principle, if a feoffment be made of divers parcels of land in the same county, livery of seizin of one parcel in the name of the whole would confer a seizin of all the parcels, unless they were held at the time by adverse possession. Stearns, 382.

Joseph Jackson, therefore, had a good right to enter, under his deed from Elizabeth Glover, and to take possession of the granted premises. He had a title to the flats, and whether any other person had or had not a better title is immaterial, as the tenants do not claim under any one who at the

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time had any title or claim to these flats, as will appear hereafter.

It appears that Joseph Jackson continued in possession until 1793, when he died, after having devised his real estate to his son Johnson Jackson, who entered thereon under the will and enjoyed the same till his decease in 1824, but there is no proof of any particular acts of ownership or possession of the flats by said devisee.

It is admitted that the demandant is one of the children and heirs of Johnson Jackson, and thus she proves a possessory title to the premises which has been undisturbed, until within a few years, ever since 1763.

This would be a perfect title, if the possession had been such as to raise the presumption that the former owner had knowledge that the claim was adverse and that his seizin had been interrupted. But this notice is not necessary; the adverse party does not claim under a prior title or possession. Where both parties claim under titles commencing by possession, the elder possession must prevail, unless it be afterwards defeated by such a possession of the adverse party as would constitute a disseizin. The person first in possession is presumed to have the right, and the entry of any one afterwards without right is a tortious entry.

But it has been argued by the counsel for the tenants, that there is no sufficient evidence to prove that the flats demanded of right belonged to the demandant's lot: and if so, undoubtedly the demandant's title fails.

We are however of opinion that the evidence clearly proves that the demandant's lot was laid out, extending from Orange Street to low water mark, so as to include the flats in dispute.

Previous to the year 1662, one William Colbron was seized of a large estate, including the demandant's lot, with the flats below; and there is no doubt that his title was a valid one, as no older title has been shown; and we understand that both parties claim to hold under titles derived from him. He died in 1662, after having devised three eighths of his estate to

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his daughter, Elizabeth Payne, and her children and their heirs. In 1697, by a deed of partition the shares of these children were divided and set off to each in severalty. The first lot was set off to William Payne, bounded south by the Neck, east by Orange Street, west by the sea, and north by land of Thomas Powell and Margaret his wife, one of the sisters of said Payne and a granddaughter of the said Colbron. This lot, it appears, was laid out on the south side of Colbron's estate, and was afterwards bounded by Castle Street, which, as appears by the deeds in the case, was laid out between the years 1708 and 1714, probably in 1709. For in 1708 Payne conveyed this lot to Daniel Epes, bounding it southerly on the Common; and in 1714 Daniel Epes conveyed the same to Silence Allen, bounding it by the new highway, or land of Stephen Minot, and by the partition deed between Samuel Phillips and others, it appears that a lot southerly of and adjoining to the new highway called Castle Street was laid out to Stephen Minot, and it is recited in that deed of partition, that the land thereby divided was bounded northerly by Daniel Epes on the westerly side of Orange Street.

Payne's lot, therefore, is clearly located next adjoining Castle Street, and extends from Orange Street westerly to the sea, which clearly includes the flats to low water mark; otherwise the lot would at no time be bounded by the sea except at high water mark, and this would be inconsistent with the obvious meaning of the words of description.

The next lot northerly of William Payne's lot was set off to Thomas Powell and his wife Margaret, and was bounded south by William Payne, east by the said highway or Orange Street, north by a lot set off to Thomas Walker and Rebecca his wife, another sister of said Payne, and westerly by the sea; and the next lot northerly was set off in severalty to said Thomas Walker and his wife, bounded also westerly by the sea. Several other lots were likewise assigned in severalty to the parties to said deed of division, the bounds of which are not material in the decision of this cause. By this division,

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the flats in front of the three lots first above mentioned were all divided between the several parties in severalty. How the residue of Colbron's estate was divided between the other devisees under his will, does not appear; but the presumption is that it was in no respect inconsistent with the above mentioned division between the heirs of Elizabeth Payne.

The demandant claims to hold under a title derived from Thomas Powell and wife.

They by their deed, dated April 15th, 1703, conveyed the lot assigned to them in the before mentioned division to John Clough, bounded easterly on the way leading to Roxbury, (Orange Street,) southerly upon the land of William Payne, and at the rear of the westerly end by the flats, and northerly by land of Thomas Walker.

It is contended by the tenants, that by this description the flats were excluded, and generally there is no doubt that a lot bounded by flats would be construed so as to exclude the flats; but in construing a deed all the language of its various parts is to be regarded, and if any be apparently inconsistent, they are to be reconciled, if they may be by any reasonable construction. Now, as it appears by the language of the deed that the whole lot was intended to be conveyed, and as it is bounded by the rear of the lot of the westerly end, it does not seem to be a strained construction to hold that the flats passed by the deed. But it is not necessary to decide this question, as the flats belong to the heirs of Powell and wife if they did not pass by the deed to Clough; and as the tenants show no title derived from them, they cannot set up their title, (especially one so ancient and so long dormant), to defeat the title since acquired by the demandant and those under whom she claims. John Clough continued to hold the lot until April, 1741, when he conveyed the same to his daughter Elizabeth Glover, who afterwards conveyed it to Joseph Jackson, the demandant's ancestor.

The description of the lot in this deed is substantially the same as that contained in the deed from Powell and wife to

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John Clough; but this was a conveyance of a messuage with the appurtenances, and as the flats below belonged to their lot by the division between the children of Elizabeth Payne, they passed to Elizabeth Glover as appurtenant to the lot.

For although land cannot pass as appurtenant to land, it may pass as appurtenant to a messuage. *Doane* v. *Broad Street Association*, 6 Mass. 332.

Thus it appears that the demandant has shown a good and perfect title to the lot assigned to Powell and his wife above high water mark, and a connected and continued possessory title to the flats below, claimed as belonging to that lot, ever since the year 1741. These flats were located as part and parcel of the lot assigned to Powell and wife in 1697.

This possessory title is good and valid against all persons not claiming under Powell and wife, unless they can show that that division was not valid, and that they have a better title under some one of the heirs or devisees of Colbron; or that they derive a title from some proprietor who was seized and possessed previous to the seizin and possession of Colbron; or had a better title than he had.

And this the tenants have failed to show.

The title conveyed to the tenants by Francis C. Lowell is not traced back to the heirs or devisees of Colbron, nor does it appear what flats, if any, were included in his lot.

This lot, in 1780, was conveyed by one Nathaniel Sparhawk to Joshua Farrington. In 1785, Joshua Farrington conveyed the same lot to Edward Tuckerman, who, in 1791, conveyed to Christopher Minot; but in all these conveyances the lot is bounded westerly on the beach; so that, by this description, the flats seem to be excluded. It is true that the flats might pass as appurtenant to the lot conveyed, if it were shown that the flats below were included in the original location of the lot. But this does not appear by any evidence in the case.

In 1807, Christopher Minot conveyed the lot he purchased of Edward Tuckerman by a deed of warranty to Isaac P. Davis, bounded westerly on the flats; and by another deed

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released his title to the flats below. What his title was does not appear, but the form of conveyance indicates a doubt as to its validity.

In 1821, Isaac P. Davis conveyed his title to Francis C. Lowell. This title, thus derived, cannot certainly prevail against the elder title of the demandant.

As to the other deeds put into the case, by the tenants, no particular remarks seem necessary. They are all subsequent to the death of Colbron in 1662.

He therefore must be considered the lawful proprietor of the flats demanded, and of other flats to a considerable extent northerly.

How all the flats were divided between the several devisees under his will, has not been shown by either of the parties.

But the demandant has shown that the southerly part of the flats, including the flats demanded, were divided between the children of Elizabeth Payne; and, as before observed, the presumption is, nothing appearing in evidence to the contrary, that the flats northerly were divided between the other devisees. The fact may be otherwise; but if so, it is incumbent on the tenants to show it.

It has been argued that the flats belonging to Colbron's estate ought to be so divided as to allow to each party holding und r his title his proper and proportional share of the flats. This argument might perhaps be well founded, if the whole division of that estate had been shown; but I think it manifest, by the inspection of the map, that if such a division were to be made, no part of the flats demanded would be included within the Lowell lot.

But the argument cannot be maintained upon the facts reported.

We have no knowledge how the flats were divided, except between the children of Elizabeth Payne.

They might have had assigned to them, in the general division of the estate between the devisees under Colbron's will, a larger share of the flats and a less proportion of upland than the other devisees, or it may have been otherwise.

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The presumption is that the division between the children of Elizabeth Payne was correctly made, and upon the facts reported it cannot be disturbed by the tenants.

The conclusion is that the demandant, having shown an elder and better title than the one shown by the tenants, is entitled to judgment; saving, however, to the latter the right of having the value of the betterments or improvements made by them ascertained, as provided in the report of the case.

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ACTION.

Where one, who is restrained of his liberty against his will, and without legal process, as an insane person, employs counsel to prosecute a writ of *habeas corpus*, on his behalf, for the purpose of investigating the grounds and circumstances of the restraint, the counsel so employed will be entitled to recover a reasonable compensation for his services, provided they be rendered in good faith, and upon due inquiry into the causes of the confinement, and the condition of the party be such, that an investigation before a judicial tribunal is proper. *Hallett* v. *Oakes*, 296.

See CORPORATION.

ACTION ON THE CASE.

1. An action on the case, for causing a writ of *habeas corpus* to be issued, and served upon the party therein alleged to be restrained, without his authority and against his consent, cannot be maintained, if it appear that the complaint was made by authority from the plaintiff, and at his request, expressed either directly to the defendant, or indirectly through some other person. *Linda* v. *Hudson*, 385.
2. An action on the case cannot be maintained by a widow, to recover damages for the loss of her husband, or by a father for the loss of service of his child, in consequence of the death of the husband or child, occasioned by the carelessness or fault of the agents or servants of a railroad corporation. *Carey* v. *Berkshire Railroad Co.*, 475.

See ARBITRATION.

ADMINISTRATION.

1 The next of kin of one deceased intestate suffered thirty days to elapse after his death, without taking any measures to obtain administration of his estate: A creditor of the intestate then applied, by petition, to the judge of probate, to be appointed administrator, and the judge ordered public notice to be given (which was done) to all persons interested in the estate

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of the intestate, to appear and show cause why the prayer of the petition should not be granted: At the time and place appointed by the notice, the father of the intestate appeared, for the purpose of objecting to the petition, and being inquired of by the judge, whether he wished to take the administration, replied that he would have nothing to do with it: The judge of probate thereupon proceeded, and granted administration to the petitioner, and the father appealed: It was held, that the declaration of the appellant, not being recorded, was not an effectual renunciation, and that such public notice, especially as the appellant had actual notice and appeared, was sufficient. *Arnold* v. *Sabin*, 525.

2. The demand of a creditor, applying for administration of the estate of an intestate, under the Rev. Sts. c. 64, § 4, *cl.* 2, on the neglect or refusal of the next of kin, may be proved by his book of account and supplotory oath. *Ib.*

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AGENT.

1. An agent has no right to delegate his authority to a sub-agent, without the assent of his principal; but, where from the nature of the agency, a sub-agent must necessarily be employed, the assent of the principal is implied; as, where a draft, payable at a distant place, is left with a bank for collection, it must be presumed, that it is intended to be transmitted to a sub-agent, at the place where it is payable, and not that the bank is to employ its own officers to proceed there, for the purpose of obtaining payment. *Dorch. & Mill. B.* v. *New Engl. B.*, 177.

2. The agent of the H. M. Co. at Ware, being authorized for the purpose by a vote of the corporation, made drafts on D. B. & Co. of New York, payable to the order of G. S., treasurer of the company, and one of the firm of G. S. & Co., the agents of the company in Boston, which drafts were there accepted by D., one of the drawees, who was also a member of the firm of G. S. & Co., and were then indorsed by G. S., treasurer, and by G. S. & Co., and negotiated and disposed of by them for their own benefit, under an agreement with the H. M. Co. that they would pay them at maturity: G. S. & Co. having failed before the drafts became due, and being unable to take them up at maturity, the drafts, when due, were proved and allowed as claims against the H. M. Co., who had also failed in the mean time, and dividends were paid thereon by the assignees of the latter: — it was held, that the assignees of the H. M. Co. were entitled to charge the amount of such drafts against G. S. & Co. in account

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notwithstanding, that, on some of them, the indorsement of G. S., treasurer, was made by attorney; — that some of them were paid by one of the indorsers, subsequent to G. S. & Co., without previous demand of the acceptor, and notice to such indorser; — and that some of them had been negotiated and received in payment of or as collateral security for illegal loans. *Shaw* v. *Stone*, 228.

3. A draft, by the agent of a manufacturing corporation, payable to "G. S treasurer" thereof, is payable to him personally, though described as treasurer, and not merely as treasurer for the time being, and may be indorsed by him, as treasurer, either in person, or by attorney. *Ib.*

AGREEMENT.

Where a conversation is relied upon as proof of an agreement, it is for the jury to decide, whether such an assent of the minds of the parties took place, as to constitute a valid contract, or whether what passed between them was a loose conversation, not understood or intended as an agreement. *Thruston* v. *Thornton*, 89.

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ARBITRATION.

An action on the case, to recover damages against the defendant, for falsely representing that he had funds in his hands, for which he was chargeable as the trustee of a debtor of the plaintiff, whereby the plaintiff was induced to sue out a trustee process against such debtor, and the defendant as his trustee, from which the defendant was discharged on his answer, being submitted to arbitration by a rule of court, it was held, that the arbitrators were not authorized, under such submission, to admit the plaintiff to prove, as a ground of claim, that the defendant's statement, on oath, in his answer, that he had no funds, was false. *Merrill* v. *Gold*, 457.

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ATTESTATION.

The attestation of a note, within the Rev. Sts. c. 120, § 4, must be made with the knowledge of the promisor, and as a part of the same transaction

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with the making of the note; and whether it is so made is a question of fact for the jury, as to which the burden of proof is on the promisee. *Drury* v. *Vannevar*, 276.

ATTORNEY.

The authority of an attorney, who has been employed by a director or other analogous officer of a corporation, to appear for it, without any specific vote therefor, and who has been paid for his services by the corporation, is sufficiently proved. *Field* v. *Propr's*, &c., 11.

See WITNESS, 2.

AUDITOR.

An action for goods sold and delivered having been referred under the statute (Rev. Sts. c. 96, § 25) to an auditor, who reported, that it was objected that the goods were sold on barter account, and to be paid for in printer's ink, — that the objection was sustained only as to a part of the goods, which were paid for accordingly, by way of set-off, — and that the plaintiff was entitled to recover for the balance of the account; — it was held, that the auditor had not therein exceeded his authority. *Bradley* v. *Clark*, 293.

AUTHORITY.

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AWARD.

An award of arbitrators, appointed by a submission before a justice of the peace, pursuant to the Rev. Sts. c. 114, and returned to the court of common pleas, may be recommitted to the arbitrators, with directions to amend the award, without rehearing the parties on the merits, by certifying whether the arbitrators were all present at the hearing and adjudication. *Blood* v. *Robinson*, 389.

BAIL.

In a *scire facias* against bail, it is no defence, that the defendant in the original action, at the time of his arrest, was the *chargé d'affaires* of this government to a foreign country, and was then on his way thither to enter upon the duties of his office. *Springfield C. M. Co.* v. *West*, 388.

BAILEE.

A person employed as a laborer, to discharge the cargo of a vessel, does not stand in the relation of a bailee to the property of which the cargo consists. *Comm'th* v. *Doane*, 5.

See TRESPASS, 2.

BANK.

1. A bank, by which notes and bills, payable at a distant place, are received for collection, without specific instructions, is bound to transmit or to cause

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the same to be transmitted, by suitable sub-agents, to some suitable bank, or other agent, at the place of payment, for that purpose; and where suitable sub-agents are thus employed, in good faith, the collecting bank is not liable for their neglect or default. *Dor. & M. Bank* v. *N. E. Bank*, 177.

2. The D. and M. Bank, at M., having discounted a number of drafts, payable in W., transferred the same, by a general indorsement, and without any specific instructions, to the N. E. Bank, in Boston, their general agents, for collection: the latter, having no correspondent in W., transferred the drafts, by a like general indorsement, to the C. Bank, in Boston, then and afterwards in good credit, for collection: the C. Bank transmitted the drafts to their correspondent, the Bank of the M., in W., for the same purpose: the C. Bank having subsequently failed, the N. E Bank demanded the drafts, of the B. of the M. before they became due: the latter refused to deliver the drafts, but collected them, and applied the proceeds to the payment of a balance due them from the C. Bank; whereupon the N. E. Bank commenced an action against the Bank of the M. to recover the amount: — it was held, 1st, that the N. E. Bank, having acted in good faith, and the C. Bank being a suitable agent, had authority to employ the latter to make the collection; 2d, that no proof of general usage was necessary to give the N. E. Bank such authority; and, 3d, that, as the drafts were transferred to the N. E. Bank, by a general indorsement, that bank might transfer them in the same manner to the C Bank, and were not bound to make a restricted indorsement. *Ib.*

See TAXATION.

BANKRUPT.

Where a bankrupt, under the United States bankrupt act of 1841, knowing that one of his creditors, who is about to oppose his discharge, can prove that he has done acts, which, if shown to the district court, would prevent him from obtaining his discharge, pays such creditor a sum of money to induce him not to oppose the discharge, and such creditor thereupon withdraws his opposition, and the bankrupt obtains his discharge, the same may be impeached and avoided under the fourth section of the act. *Coates* v. *Blush*, 564.

BILL OF DISCOVERY.

1. The defendant, in a bill of discovery, is not bound to answer any interrogatories, which may be used as evidence against him on a criminal charge. *Adams* v. *Porter*, 170.

2. The rule of the English courts of equity, that the plaintiff in a bill of discovery "shall only have a discovery of what is necessary to his own title, and shall not pry into the title of the defendant" (Cooper Eq. P. 58), is not applicable in this commonwealth. *Ib.*

3. The assignee of an insolvent debtor, who has commenced an action of trover for the recovery of personal property, mortgaged by the insolvent before his insolvency, may maintain a bill of discovery against the

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mortgagee, for the purpose of obtaining evidence to impeach the title of the latter. *Ib.*

BOSTON HARBOR.

See NAVIGABLE WATERS.

BURDEN OF PROOF.

Where an article is sold, with a warranty, or a representation amounting to a warranty, as to its quality; and, in an action by the seller to recover the price, the buyer relies upon a breach of the warranty, or the falsity of the representation, to reduce the amount of his liability; the burden of proof is on him to show, that the quality of the article does not correspond with the warranty or representation. *Dorr* v. *Fisher*, 271.

See ATTESTATION.

BY-LAW.

The act of 1847, c. 166, which authorizes towns "to make all by-laws that may be necessary to preserve the peace, good order and internal police" therein, and to annex suitable penalties, &c., subject to the provisions of the Rev. Sts. c. 15, §§ 13, 14, 15, does not authorize the making of a by-law by a town, prohibiting the sale therein, by any person not duly licensed according to law, of "strong beer, ale, or any other intoxicating liquor, in a less quantity than twenty-eight gallons, and that delivered and carried away all at one time." *Comm'th* v. *Turner*, 493

CHARGÉ D'AFFAIRES.

See BAIL.

COMMON SELLER.

See SPIRITOUS LIQUORS.

COMPLAINT.

1. A complaint, on the Rev. Sts. c. 47, § 3, which alleges that the defendant did presume to be a retailer, &c., and did sell to a person named therein, a specified quantity of spiritous liquor, is not bad for duplicity; nor is such a complaint defective, for not showing what kind of spiritous liquor the defendant is charged with selling, or to whom it was delivered, or by whom it was carried away. *Comm'th* v. *Wilcox*, 503.
2. In a complaint on the Rev. Sts. c. 47, it is a sufficient allegation of a sale, in violation of the third section, that the defendant "then and there sold to the complainant spiritous liquor in a less quantity than twenty-eight gallons." *Comm'th* v. *Roberts*, 505.
3. Where a complaint, on the Rev. Sts. c. 47, § 3, alleged that the defendant "sold to the complainant spiritous liquor in a less quantity than twenty-eight gallons, without being first duly licensed as a retailer of wine and spirits, according to law;" it was held, that the latter words did not sufficiently

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allege, that the defendant was not duly licensed to make the sale complained of. *Ib.*

CONDITION.

The commonwealth, by a deed dated November 23d, 1801, granted a township of land in Maine to J. P., upon the condition, that the grantee, "before the 1st of January, 1801, shall have settled thirty families within said township:" This condition was not then or ever afterwards performed according to its terms; but the legislature, by resolves of 1816, *c.* 116, and 1831, *c.* 40, extended the time for its performance to the 1st of June, 1836, and, by a resolve of 1836, *c.* 43, authorized a commutation therefor, at the rate of thirty dollars for each family, which might then be deficient; declaring, at the same time, that all lands, on which the commutation money should not be paid, at that time, should be forfeited, and providing, also, that grantees might then have the further time of one year for such payment, by giving bonds therefor satisfactory to the land agent: On the 1st of June, 1836, R. S. R. and J. B. being the owners severally of certain undivided portions of the township, by mesne conveyances from J. P., gave their bond to the land agent for $900, being the amount of the commutation money due thereon, payable in one year: In January, 1840, R. S. R. died, intestate, leaving sufficient estate for the payment of all his debts, including the bond to the commonwealth, and J. L. R., his son, was appointed administrator of his estate: On the 5th of June, 1843, the defendant, claiming title by mesne conveyances from J. P., conveyed one undivided fourth part of the township to C. B., by a deed containing the usual covenants, and also a covenant against all claims and demands of the commonwealth, on account of the condition in the original deed to J P., and "to extinguish and cause to be discharged all claims on the granted premises, on account of the settling duties commonly so called:" In January, 1845, J. B. died, leaving sufficient estate for the payment of all his debts, including the said bond to the commonwealth: On the 14th of March, 1845, the legislature, by a resolve of that date, directed the land agent (first giving the notices therein specified) to take measures for the recovery of possession of all lands granted on the condition above mentioned, where the same had not been complied with; declaring, that a compliance with the provisions of the resolve of 1836, *c.* 43, should be deemed to be a full performance of the said condition, and that the title to lands, in reference to which the same had been so performed, should be complete in the grantees and their assigns: On the 6th of January, 1846, C. B., the defendant's grantee, conveyed the premises, by a deed of quitclaim, to the plaintiff, who entered and took possession under the same: On the 27th of January, 1846, J. L. R., the administrator of R. S. R., paid B. & R.'s bond to the commonwealth for the commutation money, with interest, amounting to $1445; and, on the 3d of March following, the land agent, in pursuance of a resolve of the legislature, released to him all the right and title of the commonwealth in the township: In October, 1844, B. and the defendant conveyed all their remaining interest in the

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township to certain grantees, who thereupon entered upon the premises, and were in the actual occupation thereof, at the time of the commonwealth's deed to J. L. R.: Immediately on receiving his deed from the commonwealth, J. L. R. went upon the land and notified the parties in possession, namely, the plaintiff and the grantees above mentioned of B. and the defendant, of his claim thereto, and of his purpose to maintain the same at law, if necessary: A negotiation thereupon ensued, between J. L. R. and the parties in possession (with the exception of the plaintiff), which resulted in a conveyance from the former, June 11th, 1846, to the grantees of B. and the defendant and one other person, of all his interest in the township; from which time, the usual acts of ownership were exercised by the said grantees, and not by the plaintiff: In an action of covenant by the plaintiff against the defendant, on the covenants contained in the deed of the latter to C. B., it was held:

(1.) That the effect of the resolve of 1816, c. 116, (the provisions of which were further extended by the resolve of 1831, c. 40,) was to confirm the original deed to P., — to waive the performance of the condition precedent contained therein, and to substitute therefor a condition subsequent, — and to vest the estate in P. and his assignees, subject to such new condition.

(2.) That, by the resolve of 1836, c. 43, lands held upon the said condition were discharged from a liability to forfeiture for non-performance of the same, by the payment of the commutation money on or before June 1st, 1836, or by giving a satisfactory bond for such payment, within a year from that time.

(3.) That the giving of such bond by B. & R., although the same was not paid, according to its terms, vested an absolute title to the township in P or his assignees.

(4.) That, by the conveyance of the township from the commonwealth to J. L. R., on his payment of the amount due on the bond, no estate passed to him.

(5.) That if the non-payment of the bond were a breach of the condition in the original deed to P., so as to entitle the commonwealth to recover possession for condition broken, the commonwealth could make no valid conveyance of the estate, without first recovering possession. *Thompson v. Bright*, 420.

See INSOLVENT DEBTORS.

CONSPIRACY.

1. An indictment for a conspiracy alleged, in the first count, that the defendants conspired together to cheat and defraud P. S. S. of his goods; in the second, that they conspired to get the goods of P. S. S. into their possession, under color and pretence of buying the same; and, in the third, that they conspired to get possession of the goods of P. S. S., upon trust and credit, and then to remove the same out of the commonwealth: On the trial of this indictment, evidence having been given of a purchase of goods by the defendants of P. S. S., ostensibly for cash, but, in fact

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on the short credit resulting from the indulgence usually allowed on cash sales: — it was held, that the prosecuting officer might inquire of a witness, whether, at the time of the sale, the standing and credit of the defendants were such, that they could have bought goods on credit; — also, that other purchases of goods, made by the defendants of other persons, at about the same time, and under the same circumstances, with the purchase of P. S. S., were admissible in evidence, to show the nature and extent of the defendants' business, and to prove the criminal intent alleged in the indictment; — also, that evidence of the defendants' having obtained bills of lading, about the same time, and forwarded them to their correspondents in other places, accompanied by drafts thereon, before the goods described in such bills of lading had been in fact purchased, was admissible to prove the criminal intent. *Comm'th* v. *Eastman*, 189.

2. The obtaining of goods on credit, by an insolvent person without disclosing his insolvency, and without having any reasonable expectation of being able to pay for such goods, in and by means of the fair and ordinary course of his business, is not of itself such an unlawful act, as may be the subject of a conspiracy; though, it would be otherwise, i seems, in the case of a purchase made without any expectation of payment. *Ib.*

3. The obtaining possession of goods, under the pretence of paying cash for them, on delivery, the buyer knowing that he has no funds to pay with, and appropriating the goods to his own use, in fraud of the seller, is such a fraud or cheat, as may be the subject of a conspiracy. *Ib.*

4. In an indictment for a conspiracy to do an act, which is a well known and recognized offence at common law, the object of the conspiracy may be described by the general terms, by which it is familiarly known; if the alleged purpose be the doing of an act, which is not unlawful in itself, but which is to be effected by the use of unlawful means, those means must be particularly set forth; if it be the doing of an act, which is not an offence at common law, but only by statute, the purpose of the conspiracy must be set forth in such a manner as to show that it is within the terms of the statute. *Ib.*

5. When a conspiracy is plainly and technically alleged, the acts done in pursuance of it need not be set out; or, if set out, they need not be proved. *Ib.*

6. It is not a sufficient statement of the offence, in an indictment for a conspiracy to cheat, to allege that the defendants conspired together to cheat and defraud P. S. S. of his goods, or to acquire and get into their possession the goods of P. S. S., under color and pretence of buying the same; or to get possession of the goods of P. S. S upon trust and credit, and then to remove and transport them out of the commonwealth. *Ib.*

7. The words "cheat and defraud" do not necessarily import any offence, either by statute, or at common law; and, therefore, an indictment for a conspiracy, in which the object is alleged to be to "cheat and defraud,"

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must set forth in detail such further allegations, as will show the object to be an offence, either by statute, or at common law. *Ib.*

CONTRACT.

1. The record of a vote of the directors of a manufacturing corporation, appointing an agent, and an acceptance and record of the report of a committee, appointed to arrange with him for his compensation, do not constitute a contract in writing. *Shaw* v. *Stone*, 228.

2. An agreement was entered into, July 2d, 1841, between B. and C., by which it was agreed, that C. should construct and finish, in a specified manner, and to the acceptance of the engineers, on or before June 1st, 1842, a certain section of the P. S. & P. Railroad; that if the work should not be done within the time fixed, B. should assess such damage for the delay as he should think just and reasonable, and charge C. with the amount; that if it should at any time appear to B. or the engineers, that C. was not proceeding with sufficient speed, they might determine that the contract had been abandoned by C., in which case, the agreement on the part of B. should become null and void, and any balance which might otherwise be due to C. should be forfeited to B., who might thereupon contract with others to finish the road; that if C. should not well and truly perform the agreement on his part, B. might dismiss him from the work, in which event, a like forfeiture should be incurred; that, in consideration of the fulfilment by C. of the agreement on his part, B. should pay him, for his labor, at the rates specified in the agreement, in monthly payments of three fourths of the amount of the work done, to be estimated by the engineer; and that when the whole section should be accepted, as completed agreeably to the contract, the balance should forthwith be paid to C.: On the 27th of December, 1841, C. drew an order in favor of L. on B., for $100, which B. accepted "to pay when due according to C.'s contract:" On or about the 1st of June, 1842, the contract was abandoned by C., either voluntarily, or by a dismissal according to its terms. In an action by the payee against the acceptor, to recover the amount of the order, it was held:

(1.) That the final payment was dependent, and could only be demanded upon the completion of the work.

(2.) That the monthly payments were independent, and became due at the end of each month.

(3.) That, if, at any time between the acceptance of the order and the abandonment of the work, the amount of the order was due on any monthly payment, the defendant became bound to pay according to the terms of the acceptance.

(4.) That, if the legal consequence of a dismissal or abandonment were a forfeiture of the balance due at the time to C., (of which the court gave no opinion,) such balance would not include money actually paid to C., according to the terms of the contract, or at C.'s request promised to be paid to another, without reference to such possible forfeiture. *Lord* v *Belknap*, 279

See AGREEMENT; INSOLVENT DEBTORS, 1, 3.

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CONTRIBUTION.

See Devisee.

CORONER.

See Jury.

CORPORATION.

The president of a manufacturing corporation has no authority as such to commence an action in the name of the corporation. *Ashuelot M. Co.* v. *Marsh*, 507.

COSTS.

1. Where the defendant in a bill of discovery demurred, and the demurrer was sustained as to certain formal parts of the bill, and was overruled as to the residue, and was then withdrawn, and the bill amended, it was held, that the defendant, notwithstanding the delay produced by filing the demurrer, should be entitled to his costs, on filing full and proper answers. *Adams* v. *Porter*, 170.
2. A plaintiff in error, who is discharged on the writ, is entitled to his costs for travel, as an item of the legal costs, to be "borne by the commonwealth, nothwithstanding, that during the pendency of the writ of error, he imprisoned in a house of correction, under the sentence against him. *Britton* v. *Comm'th*, 302.
3. Where the court of common pleas set aside a verdict of a jury, summoned to reassess damages for land taken for a railroad, they have no authority to award costs to the party objecting to the verdict. *Conn. R. R.* v. *Clapp*, 559.

COUNSEL.

See Action; Witness, 2.

COURT OF COMMON PLEAS.

The court of common pleas is not bound to entertain and consider a motion for a new trial, for a misdirection of the jury in matter of law; and such motion ought not to be considered, unless upon the understanding, that the parties are to abide the result. *Sylvester* v. *Mayo*, 308.

CUSTOM.

See Larceny

DAMAGES.

The damages recoverable against a town, under the Rev. Sts. c. 25, § 22, are for an injury to the person or property only, and not merely on account of a risk or peril, which causes fright and mental suffering; but, where an actual injury to the person is sustained, however small, which causes mental suffering, that suffering is a part of the injury, for which the town is liable in damages. *Canning* v. *Williamstown*, 451.

See Costs, 3; Practice, 5; Verdict, 2.

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DECREE.

See JUDGMENT, 8.

DEED.

B. K. devised to the lawful heirs of his son H. K. all the lands and real estate, situated in the county of Berkshire, which descended to him as the heir at law of his father B. K.; One of the heirs dying, and her share descending to her father H. K., he made a conveyance to S. K. in the following terms, namely, "all right, title, and interest, that I have or ought to have to a tract or parcel of land situated in Great Barrington, *being the same that was bequeathed by my father B. K., deceased, to my children;*" It was held, that these terms were not sufficient to pass an estate in Sheffield, although B. K. possessed an estate there, which was included in the devise to the children of the grantor. *King* v. *Little*, 436.

See RECITAL.

DEMAND.

Where the purchaser of real estate promised the seller to pay the taxes thereon for the current year, and, on being notified of the assessment, neglected to pay the same, and the seller thereupon himself paid the taxes; the latter was held to be entitled to recover the amount so paid without a previous demand. *Brackett* v. *Evans*, 79.

DEPOSITION.

The facts, set forth in a creditor's petition under § 19 of the insolvent law (St. 1838, c. 163), must be proved by competent evidence, before a warrant can be issued thereon; and an affidavit, taken in another state, by which it does not appear that the adverse party had notice of the taking, or that it was impossible to give him such notice, as required by the Rev. Sts. c 94, § 33, is not such evidence. *Stearns* v. *Kellogg*, 449.

DEVISE.

See TRUSTEE PROCESS.

DEVISEE.

1. Where the estate of a devisee is taken for the dower of the testator's widow, the right of such devisee to contribution, under the statute of 1839, c. 96, is the same that it would have been under the Rev. Sts. c. 62, §§ 25, 26, if the estate devised to him had been taken for the payment of the testator's debts. *Blaney* v. *Blaney*, 107.

2. A residuary devisee, whose estate is taken for the dower of the testator's widow, is not entitled to contribution from the other devisees, under the statute of 1839, c. 96. *Ib.*

DISSEIZIN.

1. A disseizin of flats may be made by an appropriate occupation thereof for that purpose, as by entering upon and filling them up, or by building s

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wharf and using the flats adjoining for laying vessels at the same; in which cases, the occupation of the land, or the use of the flats, if exclusive, constitutes a disseizin of the proprietor: But passing with vessels over flats, and anchoring on them, or using them for the purpose of access to and egress from a wharf with vessels, being a usage of common right provided for in the ordinance of 1641, is not inconsistent with the right of the proprietor to a fee in such flats, and constitutes neither a disseizin nor a trespass. *Wheeler* v. *Stone*, 313.

2. Where it appeared that the tenant in a real action, who had acquired a title to a wharf by disseizin, had also exclusively occupied the flats at the end of the same, to the distance of eighty feet, for the purpose of laying vessels at such end, and had used the flats in front of the wharf, beyond the distance of eighty feet, for the purpose of access to and egress from the wharf with vessels, it was held, that the exclusive occupation to the distance of eighty feet was a disseizin of so much, but that the occupation beyond that distance was not a disseizin of the residue, and that the former did not extend to and create a disseizin of the latter. *Ib.*

3. The entering upon unenclosed flats, when covered by the tide, and sailing over them with a boat or vessel, for the ordinary purposes of navigation, is not such an open, notorious, exclusive and adverse possession, as is necessary to constitute a disseizin. *Drake* v. *Curtis*, 395.

EASEMENT.

1. Where the grantor of land conveyed to the grantee "the right of passing and repassing, draining, and all the usual easements," in and upon other land of the grantor, the easements thus created became appurtenant to the estate conveyed, and susceptible of conveyance to subsequent purchasers, as appurtenances, without express words. *Underwood* v. *Carney*, 285.

2. A right of way, appurtenant to land, is appurtenant to the whole and to every part of it; and, if such land be divided, and conveyed in separate parcels, a right of way thereby passes to each of the grantees. *Ib.*

3. J. C., being the owner of land on the easterly side of Morton Place, a court or passage way in the city of Boston, and also of the fee of Morton Place, conveyed a portion of the land to the plaintiff, "with the privilege of using said court or passage way, which, with the sidewalk, is about thirty feet in width, for the purpose of a passage way, in common with all other persons, whose estates are bounded thereby or communicate therewith:" J. C. subsequently conveyed the fee of Morton Place to R. and A., who were the owners of land on the westerly side thereof: R. and A. conveyed portions of the land to the defendants, "with the right of passing and repassing, draining, and all the usual easements on said Morton Place, not inconsistent with those of the easterly abutters:" The defendants subsequently erected on their own land, but on the line of Morton Place, warehouses with doors and windows opening upon Morton Place, and shutters projecting into the same, when open, and with sidewalks therein, having on their surface iron gratings for the admission of light to, and trap doors for communicating with, the underground

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apartments of the warehouses: In actions on the case, for obstructing the plaintiff's right of way by such erections, it was held, that the parties must be presumed to be acquainted with the usages of the place, and to have created the easement with reference thereto; that the defendants had a right to make a reasonable use of the way in Morton Place adjoining their land; that the use, which other persons, similarly situated, made of their land, was evidence of what was such reasonable use; and that, in erecting the structures complained of, it did not appear that the defendants had made any use of Morton Place, or had done any acts on their lands adjoining thereto, which were not justified by a common and well established usage in the city of Boston. *Ib.*

EQUITY.

See PARTNERS; BILL OF DISCOVERY.

EVIDENCE.

Where a party, on notice and demand, produces books or papers, which are inspected by the party calling for them, and used as evidence by him, such books or papers thereby become evidence for the party producing them: and, therefore, where the partner of a defendant, who was on trial for cheating by false pretences, being called by the latter as a witness for him and examined in chief, produced the account books of the firm, on notice and demand by the prosecuting officer, who thereupon cross examined the witness with reference to two entries in the books, and exhibited them to the jury, with reference to those two entries; it was held, that the books thereby became evidence for the defendant, as to their entire contents, and not merely with reference to the two entries for which they were originally introduced. *Comm'th* v. *Davidson*, 33.

2. A conveyance of real estate cannot be proved by oral testimony, without first giving a sufficient reason for not producing the deed. *Brackett* v. *Evans*, 79.

3. In order that the papers and letters of an insolvent debtor, produced by his assignee, may be competent evidence as coming from the possession of the insolvent, it must be shown that the assignee received them from the messenger, and that the latter took possession of them under his warrant, as papers relating to the estate of the insolvent. *Comm'th* v. *Eastman*, 189.

4. Letters addressed to a party, and found in his possession, are not evidence against him of the matters therein stated, unless the contents have been adopted or sanctioned by some reply, or statement, or act done, on his part, and shown by other proof. *Ib.*

5. Where one of two persons, who had examined and appraised the assets of an insolvent debtor, was called as a witness to the value thereof, and produced a paper signed by himself and his associate, containing the results of their appraisal; it was held, that such paper could not be read to the jury, as the joint certificate of the witness and his associate, without first calling the latter to testify to its accuracy. *Ib.*

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6 Where one of the parties to a written contract, without objection from the other, introduces parol evidence to add to such contract, with reference to a particular point, he cannot afterwards object to the introduction of similar evidence by the other party to the same point. *Shaw* v. *Stone*, 228.

7. Where the clerk of a manufacturing corporation was applied to, by letter, for information as to the terms upon which a firm, of which the clerk was also a member, conducted the business of the corporation, as its agents, and made a verbal reply thereto; — it was held, that such reply was admissible in evidence against the firm, as the confession or admission of a party. *Ib.*

8. Where, on the trial of an indictment for adultery, a witness for the prosecution testified to acts of familiarity between the defendant and his alleged paramour, occurring about the time of the offence as charged, and, on cross examination, the witness left it doubtful whether the acts testified to might not have occurred a year previous, it was held, that the doubt thus raised as to the time did not render the evidence incompetent, however its effect might be thereby diminished. *Comm'th* v. *Morris*, 391.

9. A paper, purporting to be a certificate of a marriage solemnized in another state, by a clergyman resident there, but not authenticated in any manner, is not admissible under the provisions of the statutes of 1840, c. 84, and 1841, c. 20, on the trial of an indictment for adultery, to prove the fact of marriage, "as circumstantial or presumptive evidence, from which the fact may be inferred," though such paper be derived from the possession of the wife of the defendant. *Ib.*

10. Ancient books, purporting to be the records of the Lower Housatonic Proprietary, produced by the clerk, were held admissible as evidence, without proof of the original and continued organization of the proprietary. *King* v. *Little*, 436.

11. Office copies of registered deeds, purporting to have been executed in 1736 and 1742, are admissible in evidence, without other proof. *Ib.*

12. Where a creditor of an insolvent estate presented his claim to the commissioners, who, in their report to the judge of probate, returned the same, "not allowed as on file," it was held, that the files of the commissioners were admissible in evidence, as a part and explanatory of the entry on the report; and being so admitted, and it appearing therefrom that the claim was filed by way of notice merely, and, at the time of the report, was considered as withdrawn, it was held, that such claim had not been adjudicated upon by the commissioners. *Ostrom* v. *Curtis*, 436.

13. The proceedings of a town, in the laying out of a highway, though irregular and inadmissible to prove a laying out, may nevertheless be admitted as evidence, to show the commencement of the way, in order to rebut a presumption of a dedication; or as a ground for the presumption of a grant, or a confirmation of the way as actually used, by the owner of the land; or to enable the jury to determine, whether the way is a public or a town way. *Avery* v. *Stewart*, 496.

See Administration, 2; Burden of Proof; False Pretences, 1, 4 Spiritous Liquors.

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EXCEPTIONS.

1. Where the party, against whom a verdict is rendered in the court of common pleas, moves the court for a new trial, on the ground of a misdirection of the jury in matter of law, and the motion is considered and overruled, the right to allege exceptions to the supposed misdirection is thereby waived. *Sylvester* v. *Mayo*, 308.

2. The question, whether a verdict ought not to be set aside as against evidence, cannot be raised on a bill of exceptions. *Comm'th* v. *Morris*, 391.

EXECUTION.

See MORTGAGE OF PERSONAL PROPERTY.

FACTOR.

1. A factor, having a lien on goods consigned to him for sale, to a greater amount than the value of the goods, and being called upon by a creditor to give security, agreed with such creditor and a third person, that the latter should become the purchaser of the goods, and give his notes therefor, at an agreed price, on a credit of eight months; that the notes should be deposited with the creditor as collateral security; that the goods should remain with the factor, in order to be resold by him; that the proceeds thereof, when sold, whatever the amount might be, should be paid over to the creditor, towards payment of the debt; that the notes of such third person should thereupon be cancelled; and the agreement was carried into execution accordingly: — it was held, that the transaction was a valid sale of the goods to the first purchaser, and not a mere pledge to the creditor; and, that, as between the principal and factor, the price of the goods was that for which they were first sold, and not that for which they were resold by the factor. *Shaw* v. *Stone*, 228.

2. A general agent, for buying and selling, cannot, without special authority, resort to extraordinary and expensive means, to raise money for his principal. *Ib.*

FALSE PRETENCES.

1. In an indictment for cheating by false pretences, an allegation, that the prosecutor, by means of the false representations, was induced to deliver and did deliver to the defendant certain goods, "as upon a sale upon credit," is sufficiently proved by evidence of a sale of the goods to the defendant, on his promissory note payable in four months. *Comm'th* v. *Davidson*, 33.

2. An indictment for cheating by false pretences alleged, that the defendant represented a firm of which he was a member to be then owing not more than three hundred dollars, and evidence was given of a representation by him, that the firm did not then owe more than four hundred dollars; — this was held to be a fatal variance. *Ib.*

3. One of the representations, set forth in an indictment for cheating by false pretences, and proved, was, that the defendant gave a false name; and the prosecutor testified that this misrepresentation had no influence in inducing him to part with his goods; it was the duty of the court,

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either at the time, or in the charge, to instruct the jury that such misrepresentation was not, upon the evidence, proved to have been an inducing motive to the obtaining of the goods by the defendant. *Ib.*

4. In an indictment for cheating by false pretences, it was alleged, that the defendant represented that he was a partner in trade with another person, who had put into the partnership a capital of one thousand dollars, which they (the defendant and his partner) then had invested and employed in their partnership business, and that the copartners were worth property of the value of fifteen hundred dollars, and did not owe debts amounting to more than three hundred dollars; — it was held, that evidence of the individual indebtedness of the defendant and his partner was not admissible to prove that the representations as to the solvency of the partnership were false. *Ib.*

FENCES.

1. The liability of the owner or occupant of land, which has lain unenclosed, on enclosing or depasturing the same, to pay for the one half of a partition fence, under the Rev. Sts. *c.* 19, § 12, attaches *immediately* upon such enclosing or depasturing. *Field* v. *Propr's*, &c., 11.
2. The right of an owner, who has erected a partition fence, to recover the value of one half thereof, against the owner of adjoining land, is complete by the commencement of proceedings to have the value of such half ascertained by fence viewers; and cannot be defeated by a sale of the land, and a notice by the purchaser, that he does not intend to occupy, or improve, or enclose it, subsequent to the application to the fence viewers, and notice of such application by them to the original owner, though previous to any further proceedings by them. *Ib.*
3. The *St.* of 1847, *c.* 102, repealing the Rev. Sts. *c.* 19, § 12, so far as relates to Nantucket, and providing that the depasturing only of unenclosed land in that island shall not render the owner or occupant liable for the erecting of a partition fence, is entirely prospective in its operation. *Ib.*

FLATS.

See DISSEIZIN.

FORCIBLE DETAINER.

Where a party was in the unlawful possession of a farm, lying partly in Massachusetts, and partly in Connecticut, and the owner entered on the Massachusetts side, and demanded possession of the whole, and the other party, being then a short distance on the Connecticut side, and having an ox goad in his hand, thereupon threatened violence to the owner with that weapon, if he did not leave the farm, upon which the owner abandoned his demand of possession; — it was held, that this was a forcible detainer of that part of the farm lying in Massachusetts. *Benedict* v. *Hart*, 467

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FRAUDS, STATUTE OF.

A promise by the purchaser of real estate, at the time of the conveyance, to pay the taxes that are or may be assessed thereon, for the current year is not "a contract for the sale of lands, &c., or of any interest in or concerning the same," within the meaning of the Rev. Sts. c. 74, § 1. *Brackett* v. *Evans*, 79.

See CONTRACT.

GAME OF BALL.

See TRESPASS, 1.

GUARANTY.

Where the promisor of a note, which is guarantied as "perfectly good and collectible," is insolvent at the time and continues to be so, the holder is not obliged to institute legal proceedings against him, and to prosecute the same to judgment and execution, before resorting to the guarantor *Sanford* v. *Allen*, 473.

HABEAS CORPUS.

See ACTION; ACTION ON THE CASE, 1.

HANDWRITING.

Where handwriting is to be proved by comparison, the standard used for the purpose must be a genuine and original writing, and must first be established by clear and undoubted proof: Impressions of writings, taken by means of a press, and duplicates made by a copying machine, are not originals, and cannot be used as standards of comparison. *Comm'th* v. *Eastman*, 189.

HIGHWAY.

1. Obstructions in a highway, though not on the travelled part, are defects, for injuries caused by which towns are responsible, under the statute (Rev. Sts. c. 25, § 22), whether placed there by the owner of the soil, over which the highway is laid, or by others. *Snow* v. *Adams*, 443.
2. In a vote to discontinue a town way, a description of it, as "leading from W. G.'s to the pond," is sufficient. *Avery* v. *Stewart*, 496.

See DAMAGES; EVIDENCE, 13; PLEADING, 3, 4, 5; TRESPASS, 1; WARRANT FOR TOWN MEETING.

INDICTMENT.

1. An indictment for a libel must not only contain, but it must also profess to set out, the very words of which the alleged libel is composed, that is to say, a transcript of the libellous publication, or of that part of it, which is the subject of the indictment. *Comm'th* v. *Wright*, 46.
2. Marks of quotation, used in an indictment for a libel, to distinguish

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the libellous matter, are not sufficient to indicate that the words thus designated are the very words of the alleged libel. *Ib.*

3. The words, "according to the purport and effect, and in substance," in an indictment for a libel, do not import that the very words are set out. *Ib.*

4. The word "tenor," imports an exact copy, and that it is set out in words and figures. *Ib.*

5. An indictment for a libel alleged, that the defendant published, &c., an unlawful and malicious libel, *according to the purport and effect and in substance*, as follows: — the words between *libel* and *as follows* cannot be rejected as surplusage. *Ib.*

6. An indictment for printing, publishing, or distributing an obscene paper, within the Rev. Sts. c. 130, § 10, must not only set out the printed paper in the very words of which it is composed, but must also profess to do so, by means of appropriate words for the purpose; unless the language is so obscene as to render it improper that it should appear upon the record; and in that case, the reason for the omission should be stated in the indictment. *Comm'th* v. *Tarbox*, 66.

7. The attaching of one of the original printed papers to the indictment, in place of inserting a copy, is not a sufficient indication, that the paper is set out in the very words. *Ib.*

8. It is in the discretion of the court, in which an indictment is pending, to quash it, or to leave the defendant to a motion in arrest of judgment, and the refusal to quash an indictment is not a proper subject of exception. *Comm'th* v. *Eastman*, 189.

9. An indictment ought not to be quashed, in a doubtful case, but only when it is clearly insufficient to sustain a judgment against the defendant. *Ib.*

See Complaint; False Pretences.

INSANE PERSON.

See Action.

INSOLVENT DEBTORS.

1. In an action against an insolvent debtor, to recover a debt, from which he has been discharged, the plaintiff must prove a distinct and unequivocal promise to pay the debt; and the mere payment of a part of a note so discharged, and the indorsement thereon by the debtor of the sum paid, are not sufficient to authorize a jury to infer such distinct and unequivocal promise to pay the residue. *Merriam* v. *Bayley*, 77.

2. The twelfth section of the insolvent act (St. 1838, c. 163), relating to the calling of a third meeting of creditors, is not repealed by the act of 1844, c. 178; and, therefore, where a third meeting of creditors has not been called, a certificate of the insolvent's discharge is not valid against a creditor who has not proved his claim. *Sanderson* v. *Taylor*, 87.

3. Where a contract is entered into in this state, and to be performed here between parties who are then citizens thereof; and the creditor subsequently removes to and becomes a citizen of another state, in pursuance of an intention to do so formed before the making of the

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contract; such removal and residence will not prevent the debtor's certificate of discharge, under the insolvent laws, from being a bar to an action on the contract in the courts of this state. *Brigham* v. *Henderson*, 430.

4. An alien, resident within the commonwealth, is entitled to the benefit of the insolvent laws. *Judd* v. *Lawrence*, 531.

5. On the 12th of April, 1837, the two firms of H. L. & Co. and C. & R., (the members of the latter being also members of the former,) severally made assignments under the act of 1836, c. 238, to the same assignees, F. B., W. A. F. S. and G. A. C., for the benefit of their respective creditors: The assignment of C. & R. purported to convey all their property, both as partners and as individuals, to be sold and disposed of by the assignees, and the proceeds thereof distributed among all the creditors of C. & R., and the creditors of each of them, and among all who might become their creditors, or the creditors of either of them, by reason of any then existing note, acceptance, indorsement, or liability, and who should become parties to the instrument, in the proportion of their just claims and demands against C. & R., or against C. or R.: This assignment was executed by C. & R., the assignors, and by the assignees, but not by any of the creditors of C. & R., or of either of them, and nothing was ever done under it by the assignees: On the 27th of December, 1837, the T. I. Co., a corporation consisting of the same individuals who composed the firm of H. L. & Co., which had been incorporated on the 7th of March, 1837, and in which C. & R. were owners of two thirds of the stock, was duly organized: On the 2d of January, 1838, the T. I. Co. purchased of the assignees of H. L. & Co all the assets, and entered into a contract with the assignees to pay al the debts, of H. L. & Co.: On the 10th of January, 1838, C. & R addressed a circular to their creditors, requesting an extension, upon certain terms and conditions therein proposed, which being acceded to by the greater number of the creditors, an arrangement was made accordingly for the purpose, by an instrument dated July 1st, 1838, and signed by the creditors between that day and the 22d of March, 1839, and by a conveyance, on the last named day, by C. & R. to trustees named therein, for the benefit of their creditors: The propositions of C. & R. were, that all their creditors, whose demands exceeded $500, should receive the notes of C. & R. therefor, payable in equal sums, in one, two, and three years, from the 1st of July, 1838, with interest annually, and that all other creditors should receive notes of C. & R., payable in equal sums in three, six and nine months; that C. & R. should be allowed to retain in their own hands and have the free disposal of a certain portion of the property embraced in the assignment of April 12th, 1837, as a capital for going on with their business; and that the residue should be placed in the hands of trustees, as security for the ultimate payment of the notes so to be given: By the instrument of July 1st, 1838, (which was not to take effect, unless all the creditors whose demands exceeded $500, should become parties to it,) the creditors exonerated the trustees under the

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assignment of April 12th, 1837, from all liability to them by reason thereof, and (C. & R. consenting) appointed F. B., W. A. F. S., and N. C., trustees, to receive and hold the property (specifying the same, together with the estimated value thereof) proposed by C. & R. to be placed in the hands of trustees; and the instrument then provided, that, in case C. & R. should fail to pay their notes in the manner proposed, the property might be sold by the trustees, and the proceeds thereof applied to such payment: The deed of March 22d, 1839, conveyed all the property mentioned in the instrument of July 1st, 1838, (including the shares of C. & R. in the T. I. Co.,) to the trustees and for the purposes therein named and set forth; with a condition, that if C. & R. should pay their creditors, in the manner and at the times agreed upon, and the trustees for their services, the conveyance should be void: In pursuance of the arrangement thus effected, C. & R. made a settlement accordingly with the greater part of their creditors, whose debts exceeded $500, but not with their other creditors: The trustees, at the request of C. & R. and for the purpose of enabling them to pay their first year's notes due July 1st, 1839, released to them certain portions of the trust property, on an understanding with C. & R. that they should place in the hands of the trustees evidence of a payment of notes by them to the amount of the property released: With the proceeds of the property so released, and other funds of their own, C. & R. paid the first year's notes, at maturity, with the exception of four (for the non-payment of which by C. & R., there did not appear to be any particular reason, other than the accidental neglect or delay of the holders in demanding payment), and soon afterwards delivered to the trustees, as vouchers for the property released by them, an equal amount of the notes so taken up: It did not appear, that the trustees were ever called upon to pay any claims not paid by C. & R.; or that any complaint was made to them by any creditor, on account of such non-payment; or that they were ever required by the creditors, or any of them, to take possession and dispose of the trust property, in consequence of non-payment by C. & R.: The trustees made no further disposition of the trust property, until February, 1841, after which date, sales were made from time to time under their authority as trustees; and the property was finally disposed of by them, and the proceeds paid to the clerk, in pursuance of an order of the court, passed in August, 1843: On the 7th of December, 1841, proceedings in insolvency were instituted against C. & R. on the application of certain of their creditors, in pursuance of which all their property, both partnership and individual, was taken possession of and assigned, and C. & R. received their certificates of discharge, on the 23d of February, 1843: The plaintiffs brought their bill in equity, on the 4th of April, 1842, against C. & R. and their trustees and assignees, for an account of the property assigned as above mentioned, and a distribution thereof among the creditors of C. & R.: The trustees having answered the bill, and exhibited an account of their receipts and expenditures, and of their proceedings relative to the trust, a decretal order was passed at the November term, 1844, by agreement of the parties, by which the

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indenture of April 12th, 1837, was adjudged to be inoperative, and the deed of March 22d, 1839, valid and effectual; and by which the cause was referred to a master, to ascertain and report upon the state and amount of the fund in court, — what disposition had been made of the property assigned, — what had been the proceedings of the trustees, and what compensation they ought to receive, — together with the names of the creditors of C. & R. who should prove their claims before him, and the amount due each on account of claims existing on the 12th of April, 1837, "though the evidence of such claim or claims may have changed since that day:" The order also directed the master to ascertain and report, whether any creditor had received from the property conveyed by the deed of March 22d, 1839, more than one third of his demand, as due on the 12th of April, 1837, and, if so, the excess; which excess, the order declared, should be considered a payment *pro tanto* of any dividend, to which such creditor might otherwise be entitled.

The master having made his report with reference to the several matters referred to him, and various exceptions having been taken thereto, it was held:

(1.) That it was not the effect of the decretal order to give a judicial construction to the deed of March 22d, 1839; but that the order was framed with a view to the ascertaining of such facts, as might enable the court to determine upon the rights of the parties, according to the legal construction, which might subsequently be given to the deed.

(2.) That the deed of March 22d, 1839, was so far connected with and dependent upon the assignment of April 12th, 1837, that the property conveyed by the former was to be held by the trustees, as security for the payment of the same debts, which were to have been paid under the latter.

(3.) That the instrument of July 1st, 1838, and the deed of March 22d, 1839, were to be considered as parts of one and the same transaction, and construed together.

(4.) That the arrangement thus effected was not the creation of a trust fund for the payment of the notes to be given by C. & R. in settlement with their creditors; but that such notes were to be paid by C. & R. out of their own funds and means.

(5.) That payments, by C. & R., of their first instalment notes, from whatever sources the means of making the same might be derived, did not constitute a claim on the trust fund; and, if made out of the fund, with the consent of the trustees, such payment was a misappropriation, for which the trustees were responsible.

(6.) That those of the creditors of April 12th, 1837, who had not since received any part of their claims, were not entitled to a preference as to one third, in the distribution of the fund, over other creditors one third of whose claims had been so paid; and that if any creditor had received more than one third of his claim, the excess was not to be regarded as a payment *pro tanto*, in advance, of any future dividend to which he might be entitled.

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(7.) That the deed of March 22d, 1839, was a mortgage, defeasible by the payment of their notes, &c., by C. & R., which gave the trustees no power to sell the property thereby conveyed, until after a breach of the condition.

(8.) That, upon a breach of the condition, the trustees had power to sell the property, and, with the proceeds, to pay the debts; but that they were not bound to sell the same immediately, at its then market value; that they were to exercise a discretion, as to the time and manner of sale; and that, in disposing of the property, they were only answerable for the exercise of good faith and sound judgment.

(9.) That it did not appear that there was any breach of the condition in July, 1839, or, if there were, that notice of it was given to the trustees.

The T. I. Co., having been allowed by the master to prove as a creditor of C. & R. against the fund, it was held:

(1.) That if H. L. & Co. on the 12th of April, 1837, were indorsers or sureties for C. & R., and afterwards paid the debts for which they were so liable, they would thereby become creditors of C. & R. under the assignment of April 12th, 1837.

(2.) That, by the assignment of the assets of H. L. & Co. to the T. I. Co., the latter took an equitable title thereto, with all the immunities, privileges and benefits, to which the same were entitled, and subject to the charges, equities, rights of set-off, and counter claims, to which they were subject, in the hands of the assignees of H. L. & Co.

(3.) That, under the peculiar circumstances of the case, if the T. I. Co., as the successor and assignee of H. L. & Co., had any claims, either legal or equitable, as a creditor of C. & R., under the provisions of the trust deed, it was no objection to its being allowed to prove as such, that C. & R. were members of the firm of H. L. & Co., and also shareholders in the T. I. Co.

The T. I. Co. having been allowed to prove, before the master, as a creditor of C. & R., within the terms of the decretal order, for payments of notes signed or indorsed by H. L. & Co., or by the T. I. Co. as their successor and assignee, to which notes C. & R. were also parties, either as promisors or indorsers, it was held:

(1.) That, if, on any of the notes so taken up by the T. I. Co., H. L. & Co. were in fact the principal debtors, and C. & R. sureties, such payments were not provable against the fund.

(2.) That, if, on any such notes, which were in existence on the 12th of April, 1837, C. & R. were, in fact, the principal debtors, and H. L. & Co. sureties, and such notes remained specifically, and were paid by the T. I. Co. as debts of H. L. & Co., such payments were provable against the trust fund.

(3.) That, if any such notes, which were in existence on the 12th of April, 1837, on which C. & R. were principal debtors, and H. L. & Co. sureties, had been taken up by the former, by giving their own notes therefor, with the indorsement or signature of the T. I. Co., in place of the preëxisting indorsement or suretyship of H. L. & Co., and the last

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mentioned notes were paid by the T. I. Co., such payments were a new credit, by the T. I Co. to C. & R., and, consequently, not provable against the fund.

The T. I. Co. having been allowed to prove, on account of payments made from its funds, to discharge debts of C. & R. existing on the 12th of April, 1837, it was held, that if the credit of the T. I. Co. had been loaned by its officers to C. & R. in the form of indorsements which were used by C. & R. for the payment of such debts, and the T. I. Co. paid the notes so indorsed, such payments created a new debt from C. & R. to the T. I. Co. without giving the latter any claim, legal or equitable, by way of substitution, against the trust fund.

The T. I. Co. having been allowed to prove for a balance of account, which was due from C. & R. to H. L. & Co. on the 12th of April, 1837, and had been carried forward on the books of H. L. & Co., and of the T. I. Co., and included as the first item of debit in four several accounts rendered by the T. I. Co. to C. & R. from the 30th of April, 1838, to the 30th of April, 1841; it was held, that this balance was provable against the fund, unless it had been paid or liquidated, since the original entry thereof, by means of subsequent dealings and transactions between the parties; and that charging the same in a new account of a subsequent date, or the rendering of such an account, was not such a liquidation; but that if subsequent dealings and transactions had taken place between the parties, in the course of which new credits were given, and debts made, new accounts were stated and rendered, and the balance carried from time to time to new account, and the aggregate of the payments, on general account, in such subsequent transactions, without or beyond any specific appropriation or application thereof, exceeded the balance so debited and claimed, the same must be considered as thereby liquidated and absorbed.

The T. I. Co. claimed before the master, as a debt due from C. & R. to H. L. & Co., a sum of money, taken by the common assignees on the 3d of November, 1837, from the assets of H. L. & Co., and appropriated by them to pay a debt of C. & R., for the purpose of preventing the sale and consequent sacrifice of certain stock belonging to the assets of C. & R., which was pledged as collateral security for the debt so paid; and it appearing, that, for the purpose of raising money for the use of C. & R., a new debt was immediately contracted, in favor of the same creditor, by whom the stock continued to be held as collateral security therefor, and that the stock was never redeemed, but ultimately sold by the holder, for a price less than the debt for which it was pledged, it was held, that this was not a debt provable against the fund.

The trustees, in their answer, claiming to be discharged from further accounting for certain items of property included in the trust deed, on the ground, that the same, not having been delivered to them at the time of the conveyance, had never since come into or been placed in their hands, it was held:

(1.) That as to certain shares in the T. M. Co. which were pledged as

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collateral security for a debt of C. & R., and not having been redeemed by them, were subsequently sold for less than the sum for which they were pledged, the trustees were no further answerable.

(2.) That, as to certain shares in the C. Bank, which were pledged as collateral security for a debt of C. & R. to the bank, but which were recognized and treated by the bank as the property of C. & R., to whom the dividends were paid, by whose direction the shares were subsequently sold and transferred, and by whom the proceeds, after payment of the debt to the bank, were appropriated to their own use and in part to the payment of a debt existing on the 12th of April, 1837, the trustees were accountable, notwithstanding the shares did not stand in the names of C & R.; it not appearing, that the trustees could not, at any time, have caused the shares to be disposed of, and have appropriated the proceeds, after payment of the bank, to the purposes of the trust.

(3.) That, as to the interest of C. & R. in certain shares of the W. I. Co., being the amount paid by C. & R. towards their subscription for the same, (no certificates thereof having been issued, but which, when issued, were to be delivered to the trustees,) which interest was afterwards sold by C. & R. at an advance, the trustees were accountable; it not appearing, that they had ever applied for the certificates, or had given notice to the company of the conveyance to them, or taken any measures to avail themselves of C. & R.'s interest in the shares.

The trustees, in their account, claimed an allowance for certain shares in the B. P. W., included in the trust deed, which, as they alleged, had since become of no value, and in reference to which it appeared, that in 1838, the shares began to depreciate, — that in 1839 and afterwards, they could not be sold at all, — that in 1839, the corporation was insolvent, — and that in 1841, an assessment was laid on the shareholders, to meet the liabilities of the corporation: it was held, that the trustees were entitled to the allowance claimed.

The trustees made a like claim as to certain shares in the T I Co., which had not been salable, for some years, in consequence of the stockholders having become personally responsible for debts and liabilities, by reason of a neglect to comply with the laws relating to manufacturing corporations: it was held, that the trustees were entitled to such allowance.

The trustees, in their account, claimed to discharge themselves from further accounting for certain portions of the trust property, which they had released to C. & R., in order to enable them, with the proceeds thereof, to pay their first year's notes, by crediting themselves with and producing a number of the first year's notes which had been taken up by C. & R. equal in amount to the sum with which the trustees had charged themselves, as vouchers for the value of the property so released: it was held, that the trustees were not authorized to dispose of the trust property in the manner and for the purpose stated, and that they were bound to account therefor

The trustees claimed compensation for their services under the assignment of April 12th, 1837: it was held, that they were not entitled thereto out of the fund.

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The trustees claimed, as a compensation for their services, in making sales, &c., under the trust deed, and for making sales of property in pursuance of the order of court, a commission of five per cent, amounting to $6438·80, on the whole amount of sales, namely, $128,766·28: the sum claimed was held to be unreasonably large, and the sum of $5000 substituted therefor. *Scudder* v. *Crocker*, 323.

See DEPOSITION; PROMISSORY NOTES, 6.

INSOLVENT ESTATE.

1. The decision of the judge of probate, upon the question, whether further assets have come to the hands of an executor or administrator, so as to entitle a creditor of an insolvent estate to have the commission of insolvency opened, for the purpose of allowing him to prove his claim, under the provisions of the Rev. Sts. c. 68, § 20, is a judicial act, which is conclusive upon the parties unless appealed from, and such question is not open to inquiry on an appeal from the decision of the commissioners, allowing or disallowing the claim of a creditor. *Ostrom* v. *Curtis*, 461.
2. The claim of a creditor of an insolvent estate, in whose favor the commission of insolvency is opened, under the provisions of the statute above mentioned, is not barred by any of the statutes of limitation, in consequence of the lapse of time subsequent to the closing of the first commission. *Ib.*

See EVIDENCE, 3, 12.

INSTRUCTIONS.

It is not erroneous in a judge to decline instructing the jury, in the manner requested by either party, when the instructions prayed for are not founded in the evidence, or are not applicable to the case. *Drake* v. *Curtis*, 395.

INSURANCE.

1. A policy of insurance against fire contained a proviso, allowing the insurers, at their election, instead of paying a loss in money, to replace the property lost or damaged, with other of the like kind and quality, within sixty days after notice of the loss or damage: after a loss under such a policy, the assured, by an order thereon, directed the loss to be paid to another, and the insurers assented thereto: it was held, that such order and assent operated only as an assignment of the claim of the assured under the policy, without affecting the right of the insurers to replace the property lost or destroyed, or to pay the amount of the loss in money, at their election. *Tolman* v. *Manuf. Ins. Co.*, 73.
2. In a policy of insurance against fire, the building insured was described as a brick building, with "a composition roof, occupied by several tenants, and connected by doors with the adjoining building, situate at the corner of Charles Street and the Western Avenue:" it was held, that the latter words, "situate," &c., referred to the building insured, and not to the adjoining building. *Heath* v *Franklin Ins. Co.*, 257.

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3. If, in a policy of insurance against fire, which is evidently intended to apply to one of two buildings, the description be false in one particular, when applied to one building, and false in a different particular, when applied to the other, the policy will attach to that building, which, after rejecting as surplusage that part of the description which is false when applied to it, is the most clearly and sufficiently, provided it be sufficiently, identified by the residue of the description; and, in considering, with a view to the adoption of the one or the other of the two hypotheses, which of the two particulars of the description to reject as false, the court will have regard to their relative importance as descriptive; but, if the residue of the description, after rejecting each of the particulars as false, do not, in either case, sufficiently identify the building insured, the policy will be void for uncertainty. *Ib.*

4. A policy of insurance against fire provided, that a loss should be paid in ninety days "after proof thereof," and that the insurers should have the right to rebuild, at any time, within ninety days, "after notice of the loss;" the assured wrote a letter to the insurers, informing them that it "had become necessary for the assured, under policy 8650, to give notice of a loss or damage to the premises insured, which happened on the evening of the 12th instant, and to request that they may be indemnified, according to the effect of that policy;" and no objection was made by the insurers to the form of the notice, or any request expressed for further or more particular information relative to the loss; it was held, that the letter was a sufficient compliance with the terms of the policy, as to proof and notice of loss. *Ib.*

INTENT.

See LARCENY.

JUDGE OF PROBATE.

See INSOLVENT ESTATES, 1.

JUDGMENT.

1. A personal service by notice, in order to give the courts of one state jurisdiction of a cause, the defendant in which resides in another, so that a judgment in such cause may be enforced in the latter state, must be such a notice as a court is competent to direct, and which can be served within its jurisdiction. *Ewer* v. *Coffin*, 23.

2. Where a court in Rhode Island, in which an action had been entered against a defendant who was not resident within the state, and who did not appear, ordered personal notice of the pendency of the suit to be given him, which was effected by the reading of the writ and order of the court in his presence, by the sheriff of Nantucket, within his precinct, it was held, that this notice was not such personal service, as to be the foundation of a judgment, which might be enforced in this state; whatever effect it might be entitled to, (which the court did not decide,) if the court in Rhode Island had also obtained jurisdiction of the cause by an effectual attachment of property. *Ib.*

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3. An attachment of property, in order to give the courts of one state jurisdiction of a cause, the defendant in which resides in another, so that a judgment in such cause may be enforced in the latter state, must not be merely formal or nominal, but actual and effectual; and, unless the record of the judgment discloses such an attachment, no effect ought to be given to the judgment, out of the state in which it was rendered. *Ib.*

4. Where an action was commenced in Rhode Island against a person not resident therein, and the only service of the writ was effected by an attachment of articles of trifling value, set out to the officer by the plaintiff, as the property of the defendant, and by an attested copy of the writ and of the officer's doings thereon being left with the plaintiff, who was in possession of the articles attached, it was held, that this was a merely nominal or formal attachment, and not such an actual and effectual one, as to be the foundation of a judgment, which might be enforced in this state. *Ib.*

5. If the record of a judgment, rendered in another state, set forth that notice of the action was given to the defendant, or that property was attached, and also what notice was given, or in what manner the attachment was made, the court will judge, upon the facts so stated, whether the notice or attachment was sufficient. *Ib.*

6. The jurisdiction of state courts being limited by state lines, it is difficult to see how the order of a court, served upon a party out of the state in which it is made, can have any greater effect than knowledge brought home to the party in any other way. *Ib.*

7. Mere knowledge of the pendency of a suit in the courts of another state, without service of the process, or an appearance, is not sufficient, of itself, to compromise the rights of the party in this state. *Ib.*

8. The sentence, or decree, of a court of admiralty and maritime jurisdiction, *in rem*, is binding on all the world, as to matters which were directly in issue therein: and, therefore, where an information was filed in the district court of the United States against certain goods alleged to have been imported contrary to law, and upon the proceedings thereon, the court adjudged and decreed, that the said goods be and remain forfeited to the United States; — it was held, that the judgment was conclusive evidence, that such goods were liable to forfeiture, not only at the time of the decree, but also at the time of their importation. *Whitney* v. *Walsh*, 29.

JURISDICTION.

See JUDGMENT, 1, 2, 3.

JURY.

Where proceedings for the assessment by a jury, of damages for land taken by a railroad corporation, are conducted in part by a coroner, under the Rev. Sts. c. 24, § 23, and in part by the sheriff, it is the duty of each of those officers to certify the proceedings which take place before him

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and, in such a case, where the coroner presides, it is no objection to the verdict, that the jury are not attended by a deputy sheriff. *Pittsfield & N. A. R. Corp.* v. *Foster*, 480.

See Costs, 3; Practice, 5; Verdict, 5.

JUSTICE OF THE PEACE.

A warrant, in a criminal case, may be issued by one justice of the peace, upon a complaint made to him, and may be returned with the body of the defendant before any other justice of the peace for the same county, and the offence therein specified tried and determined by the latter. *Comm'th* v. *Wilcox*, 503.

LARCENY.

A defendant indicted for larceny, in whose possession a portion of the cargo of a vessel is found, under circumstances which, if unexplained, would authorize a jury to presume a felonious taking by him, is not entitled, in order to negative the inference of an intent to steal, to give evidence of a custom for the officers of vessels to appropriate a small part of the cargo to themselves, or to prove that instances had occurred, in which the mates of vessels under a claim of right, had appropriated to themselves parts of the cargoes in their possession. Such evidence is inadmissible, because the custom, which it purports to prove, is wanting in the elements of a legal custom, and cannot be sustained as such, and, if proved, would only be applicable to the officers of the vessel. *Comm'th* v. *Doane*, 5.

LEGACY.

A legacy to one, "if he shall arrive to the age of twenty-one years, then to be paid over to him by my executor," is not a contingent but a vested legacy. *Furness* v. *Fox*, 134.

LIBEL.

It is libellous, to publish of one, in his capacity of a juror, that he agreed with another juror, to stake the decision of the amount of damages, to be given in a cause then under their consideration, upon a game of draughts. *Comm'th* v. *Wright*, 46.

LICENSE.

See Complaint.

LIMITATIONS, STATUTE OF.

The provision of the Rev. Sts. c. 120, § 9, that the time of a party's absence and residence out of the state shall not be taken as any part of the time limited for the commencement of an action against him, applies to actions which accrued before the revised statutes went into operation, provided the right of action was not then barred. *Darling* v. *Wells*, 508.

See Attestation; Insolvent Estates.

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MALICIOUS MISCHIEF.

The Rev. Sts. c. 126, §§ 39 to 45, enumerate all the different classes of malicious mischief to property, which are made punishable by law, and provide a specific punishment for each class: § 39 further provides, that, for all offences of the same kind, committed "in any manner, or by any means, not particularly described or mentioned" in the same chapter, the punishment shall be "imprisonment in the state prison not more than five years, or by fine," &c.: The subsequent statute of 1846, c. 52, § 1, provides, that, in all cases of malicious mischief, committed "in any manner, or by any means, not particularly described or mentioned in the one hundred and twenty-sixth chapter of the Rev. Sts.," the punishment shall be "by imprisonment in the county jail or house of correction, *not more* than thirty days, or by fine," &c.: It was held, that the negative words, in the last mentioned statute, limiting the punishment, operated to repeal so much of the Rev. Sts. c. 126, § 39, as relates to the punishment of the offences therein described in the general terms above mentioned. *Britton* v. *Comm'th*, 302.

MARRIED WOMAN.

See WILL.

MORTGAGE.

Of personal property.

Personal property, under mortgage, cannot be seized and sold on execution, in the same manner that it may be attached on mesne process, pursuant to the Rev. Sts. c. 90, § 78. *Lyon* v. *Coburn*, 278.

MORTGAGE.

Of real estate.

1. A mortgagee, to whom possession of the estate mortgaged has been delivered, on an execution issued upon the conditional judgment, if subsequently disseized by the mortgagor, before the expiration of the equity of redemption, may maintain a writ of entry against such mortgagor. *Miner* v. *Stevens*, 468.

2. The plaintiff, who was the mortgagee of certain real estate, brought an action for foreclosure against the mortgagor, one of the defendants, who was in possession, on which suit a conditional judgment was rendered, and a writ of possession regularly issued: Before the commencement of the action, the mortgagor had conveyed his equity of redemption to a third person, who, during the pendency thereof, conveyed the same to the other defendant: At the time of the execution of the writ of possession, both the defendants were upon the premises, and were forcibly ejected therefrom by the officer, who delivered seizin thereof to the plaintiff: The defendants subsequently entered upon the premises and committed acts of trespass, for which the plaintiff brought his action: It was held, that whatever might be the legal effect and operation of the judgment, as to

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a foreclosure, or the right of the officer to expel the owner of the equity of redemption, the action of trespass might be maintained. *Miner* v. *Stevens*, 482.

See RECITAL; TRESPASS; TRUST.

NANTUCKET.

See FENCES.

NAVIGABLE WATERS.

A building, which extends into the harbor of Boston, beyond the commissioners' line established under the acts of 1837, c. 229, and 1840, c. 34, and which is also below low water mark, and an obstruction to the navigation, is a public nuisance, notwithstanding it was erected previous to the passing of those acts. *Gurey* v. *Ellis*, 306.

NEW TRIAL.

See COURT OF COMMON PLEAS; VERDICT.

NUISANCE.

See NAVIGABLE WATERS.

OBSCENE PUBLICATION.

See INDICTMENT.

PARISHES AND RELIGIOUS SOCIETIES.

The Central Universalist Society, in Boston, was incorporated January 21st, 1823, with all the powers, privileges, and immunities, belonging to other religious societies, by law, and with power to purchase, hold, and dispose of any estate, real or personal, the annual income of which should not exceed a certain sum, for the purposes of its incorporation: The corporation, having erected a meeting-house, caused the pews therein to be appraised and assessed by a committee duly appointed and authorized for the purpose, and to be offered for sale at public auction, at the appraisal: The pews were all sold, accordingly, May 12th, 1823, and deeds thereof, prepared by the committee, in pursuance of its authority, were given by the corporation to the purchasers: The terms of the deeds were, that the pews should remain the property of the purchaser, so long as he should pay such sums, as should from time to time be assessed thereon by a legal vote of the society, for the support of the minister, repairs of the house, and other necessary expenses; but that if he should neglect to pay the assessments for one year, the pew should revert to the corporation, which was authorized and empowered to sell the same, and, after deducting what might be due to it with incidental charges, to pay the residue to such purchaser: The corporation, May 20th, 1823, adopted certain by-laws, by which, the mode of assessing and collecting the taxes, and the proceedings on the forfeiture and sale of pews, were regulated and prescribed, and which provided for the appointment of a

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standing committee, whose duty it was made, among other things, "to compute the expenses of the society and assess them on the pews according to their appraisal:" No appraisal and assessment were ever made subsequently to the first, but the taxes were notified by the treasurer, and paid quarterly by the members, upon the basis of the original appraisal and assessment, with occasional temporary additions to the amount, and a permanent one of ten per cent in 1833, but with no change in the proportions: There was no record of any computation of the expenses, or assessment of the taxes, until July, 1841, when the expenses were computed by the standing committee, and the amount directed to be ratably levied and assessed, on the pews, according to the assessment and appraisal of 1823: But it appeared by the records, that, since the year 1835, accounts of the taxes received quarterly, and of the expenditures incurred, had been annually rendered by the treasurer to the standing committee and proprietors, and had been approved by both, and that the doings of the standing committee, for the same time, had been uniformly approved by the society: On the 17th of April, 1838, an act was passed by the legislature, at the request of the society, changing its name to the Bulfinch Street Society, which was accepted by the corporation; and, in October of the same year, a minister of the Unitarian denomination was settled over it: The plaintiff purchased a pew of one of the original proprietors, on the 29th of January, 1839, and two others March 13th, 1840, and, in pursuance of a transfer indorsed on the original deeds, received new deeds thereof from the corporation, in the name of the Bulfinch Street Society: The plaintiff having refused to pay the taxes assessed on his pews subsequently to February, 1840, measures were taken by the society for the sale of his pews, as forfeited, according to the terms of the deeds; and the plaintiff, thereupon, to prevent such sale, paid the sum demanded, under protest. In an action brought to recover the sum thus paid, it was held:

(1.) That, as no mode of taxation was prescribed by the act of incorporation, the society had a right to adopt any mode, which was not prohibited by law; and, consequently, with the assent of all the proprietors, might tax the pews in its meeting-house, and regulate the proceedings therefor, by its by-laws.

(2.) That the proprietors of pews (who alone were members of the society) had a right to consent to the taxation of their pews, by receiving deeds expressly authorizing the levy and assessment of taxes thereon.

(3.) That, under the power to purchase, hold, and dispose of property, the corporation might let or sell the pews in its meeting-house, on the condition, that the lessee or grantee should pay a certain sum yearly, or such taxes as should be lawfully assessed thereon.

(4.) That one who purchased a pew, and thereby became a member of the corporation, subsequent to the change of name, and received a deed from the society under its new name, was thereby estopped from calling in question the validity of the proceedings with reference to the change of name.

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5.) That the taxes might be laid on the pews, according to the original appraisal and assessment of 1823, with such alterations therein, permanent or temporary, as might from time to time be made by the corporation.

(6.) That the approval of the treasurer's accounts, and of the doings of the standing committee, with reference to the taxes and expenditures, was equivalent to a computation of the expenses, as required by the by-laws.

(7.) That the provisions of the Rev. Sts. c. 20, §§ 7 and 30, do not extend to and regulate the proceedings of those religious societies, which have the right to tax pews, whether expressly conferred by law, or acquired by the consent of the proprietors; and, consequently, that such societies may regulate, by their by-laws, the mode of assessment and taxation.

(8.) That, on the forfeiture of a pew, for the non-payment of the taxes due thereon, for a year, according to the condition in the deeds, the corporation had a right to deduct and retain from the proceeds all the taxes then due, as well those which had been due less as those which had been due more than a year. *Mussey* v. *Bulfinch St. Society*, 148.

PARTITION.

Where a petitioner for partition alleged a seizin in fee, and, upon the facts as agreed by the parties and submitted to the court, it appeared that the petitioner's interest was only for life, the petition was amended so as to conform to the opinion of the court, and judgment for partition awarded accordingly. *Fay* v. *Fay*, 93.

PARTNERS.

1. Where one of two partners, after a dissolution, consigned partnership property to an agent for sale, the proceeds to be applied to the payment of a partnership debt, the other partner was held to be entitled to a remedy in equity against the agent, under the Rev. Sts. c. 118, § 43. *Bartlett* v. *Parks*, 82.
2. The partner, by whom the consignment was made, having become insolvent, he and his assignee were properly made defendants. *Ib.*

See Promissory Note, 3.

PEWS.

See Parishes and Religious Societies.

PLEADING.

1. It is a general rule of pleading in civil as well as in criminal cases, that, where a charge is brought against a defendant, arising out of the publication of a written instrument, the instrument itself must be set out in the writ or indictment. *Comm'th* v. *Wright*, 46.
2. Duplicity in pleading can only be taken advantage of by special demurrer; and, special demurrers being abolished, this objection cannot now be maintained. *King* v. *Howard*, 137.

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3. In an action on the case, against a town, on the Rev. Sts. c. 25, § 22, it is sufficient, in the declaration, to describe the highway as "a common road or highway, leading from the south village in Adams aforesaid, to the south line of said Adams, near to Jenks's factory in Cheshire;" but if such description leave the precise road intended in doubt, the defendants should require the plaintiff to give a more particular description, before going to trial; such want of certainty cannot be made the subject of a motion in arrest of judgment. *Snow* v. *Adams*, 443.

4. Where, in an action on the Rev. Sts. c. 25, § 22, it was averred in the declaration, "that said common road or highway was then and there greatly defective and obstructed by large quantities of logs, planks, slabs, and boards, piled up and extending along either side of said highway or common road, and so near to the beaten track and travelled path, as to be a great nuisance, and dangerous to travellers and passengers, with their horses and carriages, and that said highway or common road was blocked up and the limits of travel so narrowed and obstructed, as to render the same hazardous and dangerous to travellers and passengers;" which defects, &c., the defendants had long suffered to remain, &c., and that the plaintiff, on, &c., was carefully driving a horse and buggy, "in and upon that part of said highway, or common road, so defective, out of repair, and obstructed as aforesaid," and that his buggy was upset by means of such obstructions, to wit, "by certain logs, planks, slabs and boards, permitted by the defendants to lie within the limits of said road, and near to the travelled path or beaten track," &c.; this was held to be a sufficient averment, that the obstructions were within the highway. *Ib.*

5. In an action on the Rev. Sts. c. 25, § 22, it is not necessary to a description of the defects or obstructions complained of, that the length and breadth of the nuisance should be alleged. *Ib.*

PRACTICE.

1. It is competent for a party, after having closed his case, so far as relates to the evidence, to introduce additional evidence, by the cross examination of the witnesses on the other side, for the purpose of more fully proving his case. *Comm'th* v. *Eastman*, 189.

2. Where several persons are jointly indicted and on trial, the submitting of the case of one of them to the jury, by itself, in the course of the trial, at the instance of the other defendants, in order that such defendant, if acquitted, may be called as a witness by them, is a matter peculiarly within the discretion of the presiding judge, and depending upon his view of the evidence; to be allowed, where there is no evidence against the party, and to be refused where there is such evidence, although, in the opinion of the judge, it may be altogether insufficient for a conviction. *Ib.*

3. In an action for goods sold and delivered, an admission by the defendant, that he purchased and received the goods in question, to be paid for, not in money, but in specific articles, is not sufficient to entitle him to open and close, under the forty-first rule of the court of common pleas. *Bradley* v. *Clark*, 293.

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4. The provision of the Rev. Sts. c. 93, § 14, that when the demandant, in a real or mixed action, shall die before final judgment, his heir may appear and prosecute the suit, does not extend to a devisee of such demandant. *Drake* v. *Curtis*, 395.

5. On the hearing before a jury summoned to reassess damages for taking land for a railroad, the party claiming damages has the right to open and close. *Conn. R. R. Co.* v. *Clapp*, 559.

PROMISSORY NOTE.

1. A promissory note, for the payment, "ten years after date," of "seven hundred and fifty dollars, with interest semi-annually, fifty dollars of the principal to be paid annually until the whole is paid," is a contract that the interest shall be paid semi-annually, that fifty dollars of the principal shall be paid annually, and that the whole amount of the note, principal and interest, shall be paid in ten years after date. *Ewer* v. *Myrick*, 16.

2. The promisee, by an agreement under seal, executed on the same day with the note, covenanted with the promisor, that "if said note should not be paid at the expiration of the said ten years," he would "give up said note" to the promisor, provided the latter should execute to him a quitclaim deed of certain land mentioned in the agreement. It was held, that this agreement (assuming that the note and agreement constituted an entire transaction, which the court did not decide) did not preclude the promisee from enforcing payment of the interest, and such instalments as should become due, before the expiration of the ten years. *Ib.*

3. B. H., after the dissolution of a partnership between himself and S. W., made a negotiable promissory note, in the name of the late firm of W. and H., payable to S. W. and S. F. as partners under the firm of W. and F.; and, after a dissolution of the last named firm, and the death of S. W., S. F., in the name of W. and F., indorsed the note to himself: — it was held, that S. F. could not maintain an action on the note, as indorsee; but that as surviving promisee he was entitled to recover, on the money counts, against B. H., either as surviving promisor, if the note had been subsequently ratified by S. W., or as sole promisor, if it had not been so ratified. *Fowle* v. *Harrington*, 146.

4. A promise to forbear, for six months, to sue a third person, on a just cause of action, is a valid and sufficient consideration for a promissory note. *Jennison* v. *Stafford*, 168.

5. In a suit, by the payee against the maker, on a promissory note, given in consideration of a promise to forbear to sue a third person for six months, the burden of proof is not on the payee, to show that he has forborne according to his promise, but on the maker, to show that he has not. *Ib.*

6 Where the payee of a negotiable promissory note, for the purpose of indemnifying one who had become his surety for the payment of the fees and expenses attending the institution of proceedings in insolvency, negotiated and transferred the note to the surety, before the commencement of such proceedings, it was held, that, in the absence of fraud, the maker of the note could not set up in defence the title of the payee's assignee,

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and that it was immaterial whether the note was indorsed by the payee before or after his insolvency. *Fogg* v. *Willcutt*, 300.

See Attestation; Guaranty; Insolvent Debtors, 1.

RAILROAD CORPORATION.

See Action on the Case, 2; Costs, 3; Practice, 5; Verdict, 2.

REAL ACTION.

See Practice, 4.

RECITAL.

M. K., in 1736, by a deed, which was absolute upon its face, conveyed an estate to P. L.; who, in 1742, conveyed the same estate to R. K., by a deed, in which it was recited, that R. K. had purchased M. K.'s right of redemption therein; it was held, that this recital was no ground for presuming that the first deed was a mortgage. *King* v. *Little*, 436.

SALE.

See Burden of Proof; Factor.

SENTENCE.

See Judgment, 8.

SERVICE OF WRIT.

See Judgment, 1, 2, 3, 4.

SHERIFF.

See Jury.

SPIRITOUS LIQUORS.

In order to constitute a common seller of wine, &c., under the Rev. Sts. c. 47, § 1, it must be proved, that the defendant made three or more distinct sales of spiritous liquor: and it is not sufficient to prove merely that he had a place on his premises, fitted up in the usual manner with a bar for the sale of liquors, to be used on the premises; that the place so fitted up was provided with the liquors, or some of them, mentioned in the said section; that this place was provided with a person in the employment of the defendant, to wait upon customers; that the defendant, by himself or his agent, did, in fact, sell liquor, of some of the kinds mentioned, to be used upon his premises, to one person or more; and that the defendant, by himself, or his agent, was there ready and willing to sell to persons who might come there to buy and drink; — though these facts are proper to be submitted to the jury, as evidence of three distinct sales, upon which they may find the defendant guilty as a common seller. *Comm'th* v. *Tubbs*, 2

See By-Law; Complaint.

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See MALICIOUS MISCHIEF.

SURETY.

See PROMISSORY NOTE, 6; TRUST

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TAXATION.

The real estate of a bank, including its banking-house, is liable to taxation in the town where such estate lies. *Tremont Bank* v. *Boston*, 142.

TAXES.

See Parishes and Religious Societies.

TENANT AT WILL.

If a tenant at will, whose rent is payable quarterly, quit the premises on a quarter day, without giving three months' previous notice of his intention, he will be liable *prima facie* for another quarter's rent; and, in an action to recover therefor, the burden of proof will be on him to show, that the landlord had waived the notice, which would be a bar to the action, or that he had resumed the possession of the premises, under an agreement which discharged the tenant from further liability for rent. *Whitney* v. *Gordon*, 266.

TOWNS.

See By-Law.

TREASURER.

See Agent.

TRESPASS.

1. Where several persons were engaged in playing a game of ball in the public highway, and a traveller lawfully passing thereon was accidentally struck by the ball, it was held, that all the persons so engaged were liable in trespass; provided, that, from the width of the road, and the number of persons usually passing thereon, for the ordinary purposes of travel, the game was of such a character as to be likely to endanger the safety of travellers and passengers, and that the individual, by whom the ball was thrown, was acting in the usual manner of persons engaged in such game. *Vosburgh* v. *Moak*, 453.
2. If the bailee of a chattel, who has no authority, as against the bailor, to retain or dispose of it, mortgage it as a security for his own debt, and the mortgagee take possession under the mortgage, the bailor may maintain an action of trespass therefor against him. Wilde, J., dissenting. *Stanley* v. *Gaylord*, 536.

TRUST.

Two persons, one as principal and the other as surety, signed a promissory note, the consideration of which was a loan of money to the former, and the principal, at the same time, gave the surety a mortgage, conditioned that the mortgagor should pay the note to the promisee and save the mortgagee harmless therefrom, and should also pay a debt due from himself to the mortgagee; but the mortgage was not the inducement for the loan, nor was it made at the request, or for the benefit, or by the procure-

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ment, of the promisee: The mortgagor paid the interest on the note for several years, but no part of the principal, or of the debt due from him to the mortgagee, and afterwards died intestate and insolvent, and his estate was never administered upon: The mortgagee was never called upon to pay and never paid either the interest on the note, or any part of the principal, and the recovery of the note against him became barred by the statute of limitations: The mortgagee afterwards sold and conveyed his interest under the mortgage, for a valuable consideration, secured by notes of hand, without notice to the purchaser, or knowledge on his part, that the promisee claimed any interest therein, by way of trust or equitable lien or otherwise; and subsequent conveyances and dispositions of the mortgaged premises were made in like manner, without knowledge or notice of any such claim: The promisee, having brought his bill in equity against the mortgagee and the purchaser under him, praying that the mortgagee might be decreed to pay or assign to the plaintiff, as the equitable owner, the proceeds of the sale to such purchaser; and that the latter might be decreed to hold the premises as the trustee of the plaintiff, subject to his equitable lien, and as security for the payment of his note, and also to pay to the plaintiff, as equitably entitled thereto, the amount due from such purchaser to the mortgagee, for the premises:— It was held, that the bill could not be sustained. *Becket* v. *Snow*, 510

TRUSTEE.

See TRUSTEE PROCESS.

TRUSTEE PROCESS.

A testator devised certain property in trust, that the trustee should annually expend the income thereof, together with so much of the principal, at his discretion, as should from time to time be necessary therefor, in the comfortable maintenance and support of the testator's two daughters, in sickness and in health, and in supplying them with food, clothing, suitable attendance, and medical aid, &c.; and the trustee invested the funds in a mortgage of real estate, on which interest was payable annually, and on which he had received interest, which had never been called for by the persons or either of them who were entitled thereto, and which still remained in his hands: The trustee being summoned in a trustee process, as the trustee of one of the daughters, and of the husband of the other, it was held, that he was not liable as such. *Hinckley* v. *Williams & Trustee*, 490.

USURY.

See WITNESS.

VARIANCE.

Where the declaration alleged, that the defendant, in consideration that the plaintiff would sell and convey to him five dwelling-houses, &c., promised to pay the taxes that were or should be assessed thereon for the current

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year; and the proof showed, that the payment of the taxes was not the whole consideration of the conveyance: — it was held, that there was no variance. *Brackett* v. *Evans*, 79.

See False Pretences.

VERDICT.

1. Where the plaintiff recovered a verdict for a trifling amount more than the facts alleged in his declaration would entitle him to, the court refused to set aside the verdict, and order a new trial, for the correction of the error, provided the plaintiff would release the excess from the amount of his judgment. *King* v. *Howard*, 137.
2. Where a jury, summoned to reassess damages for land taken for a railroad, rendered a verdict, in which they assessed the damages at a certain sum, "with interest thereon from the time when the said railroad company took possession of the land," it was held, that the verdict was void for uncertainty, and that the court of common pleas had no authority to alter the same, or to supply any defect therein. *Conn. R. R. Co.* v. *Clapp*, 559.

See Costs, 3; Exceptions; Jury.

VOTE.

See Highway.

WARRANT FOR TOWN MEETING.

Under an article in a warrant for a town meeting, "to see if the town will lay out, alter, or discontinue, or otherwise dispose of, any town way," it is competent for the town to vote to lay out, or to discontinue, or to alter, any town way whatever. *Avery* v. *Stewart*, 496.

WARRANTY.

See Burden of Proof.

WAY.

See Easement.

WILL.

1. In order to satisfy the proviso in the Rev. Sts. c. 62, § 4, — "unless it shall clearly appear by the will that the devisor intended to convey a less estate," — the intention of the testator need not be declared in express terms: it is sufficient, if such intention can be clearly and satisfactorily inferred (on a comparison of the different parts of the will), either from particular provisions which are inconsistent with an intent to give a fee, or from the general import, scheme, and object, of the will. *Fay* v. *Fay*, 93.
2. Where a testator, in lieu and bar of dower, devised the "use and improvement" of one third of his real estate to his wife, and bequeathed her certain personal estate, during her life, and the income of certain other personal estate, during her widowhood, and also made devises in fee of certain real estate, by the use of the proper technical terms: it was

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held, that, by the words "use and improvement," the wife took an estate for life in the real estate; and (admitting the devise to her to be within the Rev. Sts. c. 62, § 4, which the court did not decide) that the statute did not enlarge her estate to a fee, as it clearly appeared, by the will, that the devisor intended to convey a less estate. *Ib.*

3. Trustees under a will being authorized and empowered "to grant and sell the whole or any part" of the testator's "estate real or personal, with full power to execute any deed or deeds effectual in law to pass a complete title thereto;" — it was held, that the legal estate did not vest in the trustees. *Ib.*

4. A testator gave his wife the use and improvement of one third of his real estate, together with certain personal estate, during her life, and the income of certain other personal estate, during her widowhood, and gave the residue, &c., of his estate, real, personal, and mixed, to trustees, in trust to manage, &c., and to pay over quarterly, to the several beneficiaries under the will, the rent, income, and interest of the said estate, including and embracing that the use whereof was devised to his wife; — it was held, that the trust did not extend to and include the real estate, the use and improvement of which was devised to the wife. *Ib.*

5. The rule, established in England, — that residuary devises are to be regarded as specific, on the ground, that a testator can only dispose of the lands owned by him, at the time of making his will, — if it ever was in force here, was abrogated by the Rev. Sts. c. 62, § 3, by which testators are enabled to dispose by will of subsequently acquired real estate. *Blaney* v. *Blaney*, 107

6. Where the words used in a will, if construed according to their technical force and meaning, would defeat the obvious intention of the testator, such a construction is not to be adopted. *Brimmer* v. *Sohier*, 118.

7. Where a testator, by a residuary clause, devised the residue of his real and personal estate "to the survivors of his brother and sisters," naming them; — it was held, that this was a devise of an estate in common to all the devisees who should survive the testator, with the right of possession immediately after his decease, and not a devise upon a contingency, to the two out of the three persons named who might survive the third. *Ib.*

8. The effect of a codicil, ratifying, confirming, and republishing a will, is to give the same force to the will, as if it had been written, executed, and published, at the date of the codicil. *Ib.*

9. Where a will was made before, and a codicil added after, the passing of the revised statutes, it was held, that the will might operate upon after purchased real estate, in the same manner, as if it had originally been made at the date of the codicil. *Ib.*

10. Under the Rev. Sts. c. 62, § 3, which provide for the passing, by will, of after purchased real estate, "if such shall clearly and manifestly appear, by the will, to have been the intention of the testator," it is not necessary, that the intention should be manifested by an express declaration; but it is sufficient, if it can be inferred from the several provisions of the will; and the true question seems to be, whether the testator intended to die

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testate as to all the property which he might leave, or whether he was content to die intestate as to a part, and to leave it to be distributed according to law. *Ib.*

11. Wherever there is a devise of the whole estate, or of all the residue of the estate, of a testator, — there being both real and personal estate upon which the will may operate, — an intention to give after acquired real estate may perhaps be justly inferred, unless there be some indication of a different intention to be found in the will. *Ib.*

12. The will of a married woman, under the statute of 1842, c. 74, is not valid, unless the assent of her husband be given thereto, in writing, and indorsed thereon, during her lifetime. *Smith* v. *Sweet*, 470.

WITNESS.

1. Where an agreement was made for the loan of fifty dollars, for one week, for the sum of two dollars to be paid as interest therefor; and, at the expiration of the week, the lender agreed to allow the loan to remain, on condition that the borrower would pay therefor at the rate of two dollars a week, for so long a time as the loan should remain unpaid; and, in pursuance of this agreement, the borrower paid two dollars a week for twenty-four weeks, and brought an action on the Rev. Sts. c. 35, § 3, to recover threefold the amount of interest so paid; it was held, that he was a competent witness, under § 4, both to the original agreement and to the subsequent payments. *King* v. *Howard*, 137.

2. It is no objection to the competency of a witness called for the plaintiff, that the witness was the attorney who made the writ, — that he was actively engaged in the trial as one of the counsel for the plaintiff, — and that he opened the cause to the jury. *Potter* v. *Ware*, 519.

WRIT OF ENTRY.

See Mortgage of Real Estate.

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